

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

74-1008

13
United States Court of Appeals

For the Second Circuit.

BLH, INCORPORATED,
Plaintiff-Appellee,

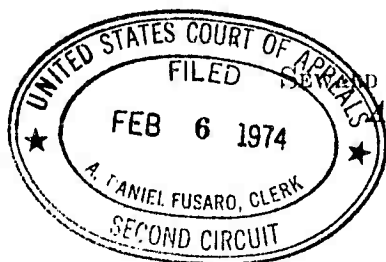
against

HODGE & HAMMOND, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX.

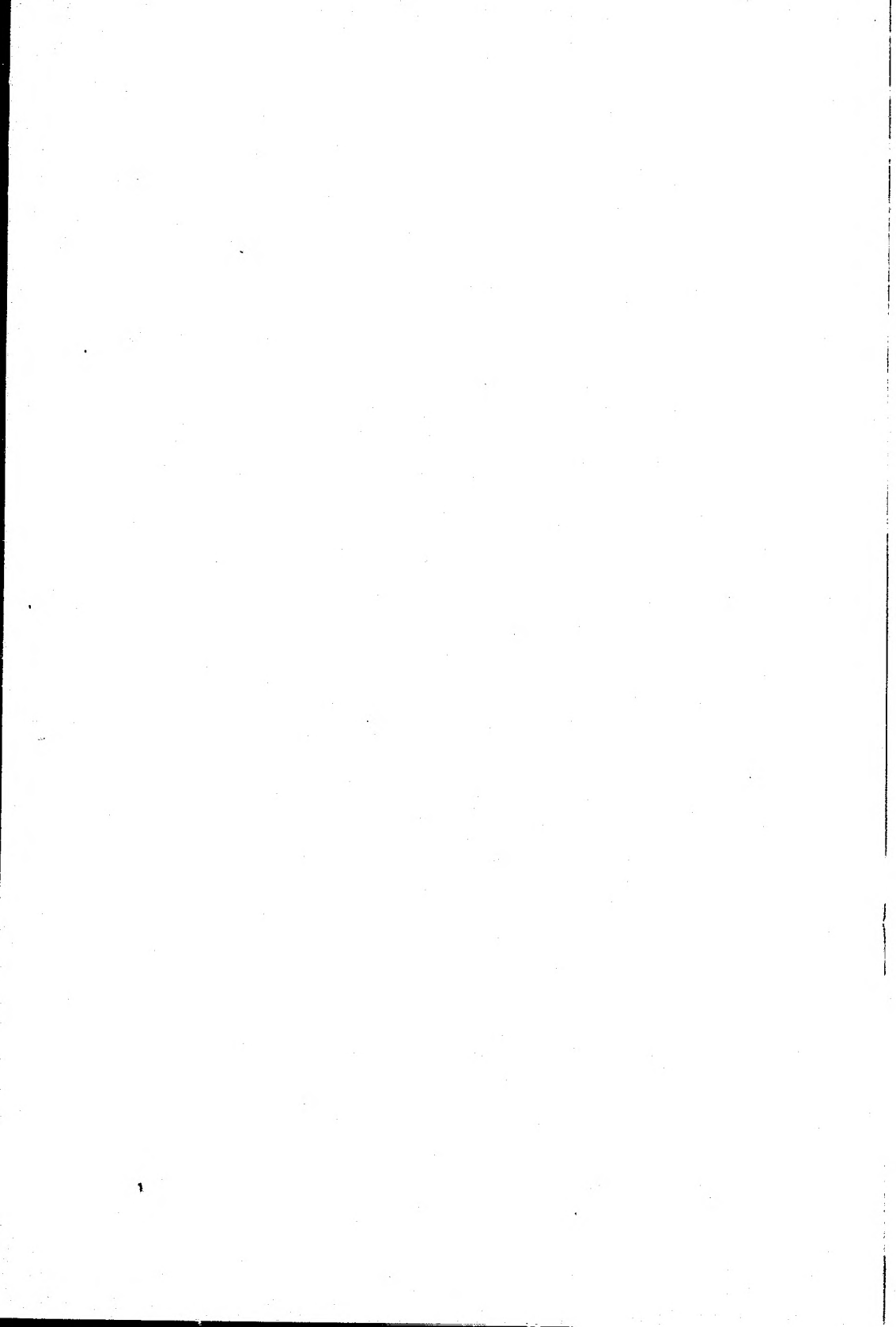
LELAND STUART BECK,
Attorney for Defendant-Appellant,
288 Old Country Road,
Mineola, N. Y. 11501



SEYMOUR & KISSEL,
Attorneys for Plaintiff-Appellee,
63 Wall Street,
New York, N. Y. 10005

PAGINATION AS IN ORIGINAL COPY

	Page
Statement Pursuant to Rule 9(g)	68a
Affidavit of James B. M. McNally, Dated September 17, 1973	69a
Reply Affidavit of Leland Stuart Beck, Dated September 19, 1973, in Opposition	71a
 D. FILED PAPERS RELEVANT TO DEFENDANT'S MOTION FOR REARGUMENT OF PREVIOUS MOTIONS:	
Opinion of Judge Charles Metzner, Dated December 6, 1973, on Motion for Reargument	72a
Notice of Motion for Reargument	73a
Affidavit of James B. M. McNally, Dated December 4, 1973	74a
Exhibit D, Annexed to Foregoing Affidavit of James B. M. McNally—Purchase Order	76a
 E. JUDGMENT AND NOTICE OF APPEAL:	
Judgment Appealed From	78a
Notice of Appeal	79a



United States Court of Appeals

FOR THE SECOND CIRCUIT.

BLH, INCORPORATED,

Plaintiff-Appellee,

against

HODGE & HAMMOND, Inc.,

Defendant-Appellant.

On appeal from the United States District Court for the Southern District of New York.

Docket Entries.

Date 1973	Proceedings
Jan. 3	Filed complaint & issued summons.
Feb. 23	Filed Defts answer to second complaint.
Feb. 23	Filed Defts Note of Issue & affdvt of notice of motion to dismiss the complaint requiring the plttf to remove pending state action to this court, permitting the service & filing of 3rd Party complaint. Ret: 3-12-73
Mar. 14	Filed stip & order that defts motion dated Feb. 21, 1973 is extended to April 2nd, 1973, Metzner, J.
Apr. 3	Filed Plttf's Stip & Order re: Defts motion before Judge Metzner at 10:00 A.M. on 4/2/73 is adjourned to 4/23/73, same time and place. Metzner, J.
Apr. 23	Filed Stip and Order that the debt's motion dtd 2-21-73 ret 4-23-73 is adj'd to 5-10-73. Metzner, J.

Docket Entries

- May 11 Filed Stip & Order before Judge Metzner, 5/10/73, 10:00 A.M. adjourned to 5/31/73 re Deft's motion
- May 29 Filed Affidavit of Lester Kissel in opposition to deft's. motion, etc.
- May 29 Filed Pltff's. Memorandum in opposition to deft's. motion to bring in a 3rd pty. deft, etc.
- May 31 Filed Affidavit of Leland Stuart Beck.
- Sept. 10 Filed affdvt. and pltffs notice of motion for summary judgment—ret. 9-17-73 at 10 A.M.
- Sept. 10 Filed plaintiffs statement pursuant to Rule 9(g)
- Sept. 13 Filed Deft. Affidavit in Opposition to the Motion of the Pltff. for Summary Judgment.
- Sept. 17 Filed Pltff Affidavit of James B. M. McNally.
- Sept. 17 Filed Pltff's Memorandum in Support of Motion for Summary Judgt.
- Sept. 20 Filed deft's reply affdvt. of Leland Stuart Beck.
- Sept. 13 Filed defendants brief in opposition to motion for summary judgment
- Nov. 14 Filed memo endorsed on motion filed 2-23-73: In view of the disposition of pltff's motion for summary judgment this motion is denied. So ordered. Metzner, J. (m/n)
- Nov. 14 Filed Opinion #40004. for all the reasons indicated in this opinion, plaintiffs First Claim which is for the balance of the purchase price on the sale of a large asphalt plant (concerning which there is prior litigation pending in the N. Y. State Supreme Court in Nassau County) is denied. The 2nd claim relates to a smaller asphalt plant for which plaintiff alleges the entire purchase price is due. The motion for summary judgment on the second claim is granted. So ordered.—Metzner, J. (m/n)

Docket Entries

- Nov. 21 Filed memorandum pursuant to Rule 9M and notice of motion to re-argue and for modification of Opinion #40004—ret. 11-28 at 9:30 A.M.
- Nov. 26 Filed defendants notice of motion to re-argue (with signature)—above motion was without signature.
- Nov. 26 Filed supplemental memorandum of law by deft. in re motion to re-argue.
- Nov. 26 Filed plttf. memorandum in opposition to defts. motion to re-argue.
- Dec. 7 Filed Judgment #73,969 that plaintiffs motion for summary judgment as to the first cause of action is denied and the action is stayed pending the disposition of the action pending in the Supreme Court, Nassau County; ordered that the plaintiffs motion for summary judgment as to the 2nd cause of action is hereby granted and it ordered that plaintiff recover of the deft., Hodge & Hammond, Inc. the sum of \$218,429.30 with interest from June 1, 1971 to the date hereof, in the sum of \$34,994.04, a total of \$253,423.34. Metzner, J.—Judgment entered—Clerk. m/n
- Dec. 6 Filed Opinion #40101. Defendant moves for re-argument. The motion is granted, and upon re-argument, the original determination is adhered to. Plaintiff is granted permission to substitute the papers submitted as Exhibit D in its affdvt. of Dec. 4, 1973 in place of the original Exhibit D. So ordered. Metzner, J. m/n

Docket Entries

- Dec. 6 Filed plaintiffs memorandum in support of re-argument and in opposition to jdgt.
- Dec. 6 Filed plaintiffs memorandum on the question of interest.
- Dec. 6 Filed defendants memorandum in connection with judgment
- Dec. 6 Filed affdvt. of James B. M. McNally (for plttff) re exhibit D

Summons.

UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action File No. 7

73 Civ. 43

BLH, INCORPORATED,

Plaintiff,

v.

HODGE & HAMMOND, Inc.,

Defendant.

To the above named Defendant:

You are hereby summoned and required to serve upon Seward & Kissel plaintiff's attorneys, whose address is 63 Wall Street, New York, New York 10005 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: January 3, 1973

s/ JOHN LIVINGSTON
Clerk of Court.

[Seal of Court]

Complaint.**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

Plaintiff BLH, Incorporated (formerly known as Baldwin-Lima-Hamilton Corporation) for its complaint alleges:

1. The jurisdiction of the Court is based on diversity of citizenship, 28 U.S.C. §1332.

2. The amount in controversy exceeds the sum of \$10,000 exclusive of interest and costs.

3. Plaintiff is a corporation organized under the laws of the State of Delaware, having its principal place of business in Media, Pennsylvania.

4. On information and belief, defendant is a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, Bronx County, New York.

FIRST COUNT

5. In or about January 1971 plaintiff sold and delivered to defendant one 10,000 pound asphalt plant (the "large plant"), which defendant accepted.

6. Defendant made partial payment for the large plant but still owes plaintiff at least \$74,871.45.

SECOND COUNT

7. In or about April 1971 plaintiff sold and delivered to defendant one 6,000 pound asphalt plant (the "small plant"), which defendant accepted.

8. Defendant owes plaintiff at least \$218,429.30 for the small plant.

Complaint

WHEREFORE, plaintiff demands judgment:

(1) against defendant on the first count in the sum of at least \$74,871.45 with interest as provided by law;

(2) against defendant on the second count in the sum of at least \$218,429.30 with interest as provided by law;

(3) awarding it the costs and disbursements of this action; and

(4) awarding it such other and further relief as to the Court may seem just and proper.

January 2, 1973

SEWARD & KISSEL

By Eugene P. Souther

A Member of the Firm

Attorneys for plaintiff

63 Wall Street

New York, New York

248-2800

Answer.**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

The defendant, Hodge & Hammond, Inc. by Paul V. Rudden, Esq., Leland Stuart Beck of counsel answering the complaint of the plaintiff alleges:

1. The plaintiff does business within the state of New York, this action arises out of the plaintiff's conduct of business within the state of New York, and there is no jurisdiction in this court based upon diversity of citizenship.

2. The transactions complained of in plaintiff's complaint involve the sale of two asphalt plants to Lizza Industries, Inc. or its subsidiary Midhampton Asphalt Corp. in which the defendant acted as an exclusive sales agent for the disclosed principal Baldwin-Lima-Hamilton Corporation and the defendant therefore is not indebted to the plaintiff.

3. That there is pending in the Supreme Court of the State of New York held in and for the County of Nassau an action entitled "Lizza Industries, Inc. and Midhampton Asphalt Corp., plaintiffs, against Hodge & Hammond, Inc. and Baldwin-Lima-Hamilton Corporation, defendants", in which the plaintiff alleges that an asphalt plant sold to plaintiff by Baldwin-Lima-Hamilton Corporation was defective and not in accordance with its contract and claims damages thereby. The asphalt plant referred to in the case pending in the Supreme Court of the State of New York is the same asphalt plant referred to in the first count of plaintiff's complaint. If the plaintiff in the State Court action prevails the plaintiff in this action will not be entitled to any payment on account of its contract.

Answer

4. That the defendant has asserted a counter-claim against Lizza Industries, Inc. in connection with the asphalt plant referred to in plaintiff's second count in connection with the State Court proceeding already pending. Defendant is not liable to plaintiff in connection with the second asphalt plant as it operated solely as a sales agent in the sale of the said plant to Lizza Industries, Inc.

5. That a necessary party to this proceeding, Lizza Industries, Inc. and its subsidiary, Midhampton Asphalt Corp. are not parties to this action.

6. The defendant has not accepted the delivery of either plant alleged to have been delivered in plaintiff's complaint as same have been delivered to Lizza Industries, Inc. which has failed to accept delivery.

WHEREFORE defendant demands judgment:

1. Dismissing the complaint of the plaintiff.
2. Requiring the plaintiff to add Lizza Industries, Inc. and Midhampton Asphalt Corp. as necessary parties defendant.
3. Staying all proceedings in this action pending the determination of the New York State Supreme Court action already commenced.
4. Awarding the costs and disbursements of this action.

Answer

5. Such other and further relief as may be proper.

Dated: Mineola, New York

February 21, 1973

PAUL V. RUDDEN

by LELAND STUART BECK

Attorneys for the Defendant

Office and Post Office Address

288 Old Country Road

Mineola, New York

Memorandum Decision.

November 14, 1973

In view of the disposition of plaintiff's motion for summary judgment, this motion is denied.

So ordered,

/S/ CHARLES M. METZNER, J.

Notice of Motion for Addition of Third Party, etc.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Comes now the defendant Hodge & Hammond, Inc. by its attorneys Paul V. Rudden, Leland Stuart Beck of counsel, and shows this court that necessary parties to this action, Lizza Industries, Inc. and Midhampton Asphalt Corp., who may be liable over to the defendant Hodge & Hammond, Inc. for any judgment which plaintiff may obtain in this action have not been joined as parties hereto and said defendant moves this court for an order dismissing the complaint, requiring plaintiff to remove state court proceedings to this court, or permitting the service and filing of a third party summons and complaint against the said missing parties.

Affidavit of Leland Stuart Beck in Support of Motion.

State of New York,
County of Nassau, ss:

LELAND STUART BECK being duly sworn, deposes and says:

That he is the trial counsel on behalf of the defendant Hodge & Hammond, Inc. and that he makes this affidavit in support of an application for an order pursuant to Rule 14 F.R.P. to serve and file a third party summons and complaint against Lizza Industries, Inc. and its subsidiary, Midhampton Asphalt Corp.

Plaintiff's action is brought to recover payment for two asphalt plants delivered by the plaintiff to Lizza Industries, Inc. and its subsidiary, Midhampton Asphalt Corp. on orders placed by the said Lizza Industries, Inc. with the defendant as the exclusive agent for the plaintiff herein a disclosed principal.

The proposed third party defendants have already instituted an action against the plaintiff and the defendant in the Supreme Court of the State of New York seeking damages in the sum of \$500,000 by reason of the failure of the plaintiff to deliver an asphalt plant in accordance with its contract of sale. A copy of that complaint is annexed to this application and the court is referred thereto for the full contents.

In the event that the plaintiff is entitled to any judgment by reason of its complaint, the defendant shall be entitled to judgment over and against the proposed third party defendants for the full amount thereof together with interests, costs, and attorney's fees.

In order that all parties to this controversy might be before the court so that the identical issues of fact and law to be determined in the litigation between them be decided in a single trial, it is respectfully urged that an

Complaint, Annexed to Affidavit of Leland Stuart Beck

order be granted permitting the service of a third party summons and complaint, dismissing the complaint of the plaintiff herein, or staying this action pending a determination of the state court proceeding.

(Sworn to by Leland Stuart Beck.)

Complaint, Annexed to Affidavit of Leland Stuart Beck.

SUPREME COURT, STATE OF NEW YORK,

COUNTY OF NASSAU.

LIZZA INDUSTRIES, Inc. and MIDHAMPTON ASPHALT CORP.,
Plaintiffs,
against

HODGE & HAMMOND, Inc. and BALDWIN-LIMA-HAMILTON
 CORPORATION,
Defendants.

Plaintiffs, Lizza Industries, Inc. and Midhampton Asphalt Corp., by their attorneys, Robinson and Cincotta, complaining of the defendants above-named, allege as follows:

FIRST: That at all times hereinafter mentioned the plaintiff, Lizza Industries, Inc., was and still is a corporation organized and existing under the laws of the State of New York with a principal place of business in the County of Nassau and State of New York.

Complaint, Annexed to Affidavit of Leland Stuart Beck

SECOND: That at all times hereinafter mentioned, the plaintiff, Midhampton Asphalt Corp., was and still is a corporation organized and existing under the laws of the State of New York with a principal place of business in the County of Nassau and State of New York and is a wholly owned subsidiary of the plaintiff, Lizza Industries, Inc.

THIRD: Upon information and belief, that at all times hereinafter mentioned, the defendant, Hodge & Hammond, Inc., was and still is a domestic corporation organized under the laws of the State of New York with a principal place of business in the County of Bronx, State of New York.

FOURTH: Upon information and belief, that at all times hereinafter mentioned, defendant, Baldwin-Lima-Hamilton Corporation, was and still is a foreign corporation licensed to do business in the State of New York.

FIFTH: That on and prior to the 30th day of July 1970, the defendant, Hodge & Hammond, Inc., was designated by the defendant, Baldwin-Lima-Hamilton Corporation, as the sole and exclusive agent for the purpose of the negotiation and sale of a New Madsen Semi-portable Asphalt Plant to the plaintiffs.

SIXTH: That prior to and at the time of the making of the aforementioned contract, the defendant, Hodge & Hammond, Inc., represented to the plaintiffs that it was acting as the designated agent for the defendant, Baldwin-Lima-Hamilton Corporation, for the purpose of the negotiation and sale of the aforementioned asphalt plant.

SEVENTH: That on or about the 30th day of July 1970 a contract was entered into between plaintiffs and defendant, Hodge & Hammond, Inc., acting on behalf of the defendant, Baldwin-Lima-Hamilton Corporation, for the purchase by the plaintiff of a New Madsen Semi-

Complaint, Annexed to Affidavit of Leland Stuart Beck

portable Asphalt Plant 10,000# capacity for a total price of \$470,000. A copy of said contract is annexed hereto and made a part hereof as Exhibit A.

EIGHTH: That in consideration for the making of the aforementioned contract the defendants did make certain representations and warranties to the plaintiffs, including, but not limited to, the capacity of production of said plant, its structural make-up and design and, further, that the said plant would be delivered to a site determined by the plaintiffs on or before the 5th day of February 1971 and in operating condition by March 27, 1971.

NINTH: That on or about the 15th day of April 1971 the plaintiffs attempted to operate the plant following the completion of its erection and ascertained that the plant was in a defective condition and could not perform as contracted for.

TENTH: That thereafter agents, servants and/or employees of both defendants came to the aforesaid site of the erected plant and attempted to make corrections, modifications and/or repair of the plant, including its various and incidental parts, all of which failed to place the plant in proper operating condition.

ELEVENTH: That from said time to date, the agents, servants and/or employees of the defendants have made continuous attempts to place the plant in a proper operating condition and have failed to do so, with the result that at the present time the plant as erected is not able to and does not perform in accordance with the aforementioned contract, all of which has caused the plaintiffs to suffer severe and extensive damages as hereinafter specified.

TWELFTH: That the plaintiffs have paid to the defendants, Hodge & Hammond, Inc., on the signing of the above contract, the sum of \$47,000. and an additional sum

Complaint, Annexed to Affidavit of Leland Stuart Beck

of \$319,539. on the delivery of the plant as aforesaid, totaling the sum of \$366,539.

THIRTEENTH: That the said asphalt plant, because of its design and in spite of defendants' attempts at modifying and altering said plant, cannot function in such a manner as to fulfill the terms and conditions of the above contract.

FOURTEENTH: That as a result of defendant's failure to provide the plaintiffs with an asphalt plant in accordance with the terms and conditions of the above contract, the plaintiffs have suffered, and continue to suffer, severe monetary damages, including, but not limited to, the repair, maintenance and redesign of the asphalt plant; inability to meet contractual requirements for delivery of asphalt production; loss of profit by reason of the plant's inability to meet minimal production requirements and extraordinary expense for additional labor and overtime to correct some defects in the plant so as to meet certain contractual obligations.

FIFTEENTH: As a result of the foregoing, the plaintiffs have been damaged in the sum of Five hundred thousand (\$500,000.) Dollars and will continue to incur additional damages.

WHEREFORE, plaintiffs demand judgment against the defendants, Hodge & Hammond, Inc. and Baldwin-Lima-Hamilton Corporation, in the sum of Five hundred thousand (\$500,000.) Dollars, together with the costs and disbursements of this action.

ROBINSON AND CINCOTTA
Attorneys for Plaintiffs
34 Audrey Avenue
Oyster Bay, New York 11771

(Verified by Carl Lizza, Jr., January 23, 1973.)

Exhibit A, Annexed to Foregoing Complaint—Contract.

HODGE & HAMMOND, INC.

Established 1933

CONSTRUCTION EQUIPMENT

Sales Rental Service

720 Garrison Avenue

Bronx 74, N. Y.

Phone: Kilpatrick 2-2400

July 30th, 1970

Lizza Industries, Inc.
1919 Middle Country Road
Centereach, N. Y. #11720

Attention: Mr. Carl Lizza, Jr.

Gentlemen:

Attached herewith is our quotation for a New Madsen Semi-portable Asphalt Plant of 10,000# capacity, as refined between yourself, our L. J. Hammond, Jr. and Ray Lynn of BLH Co.

Price of the Plant is \$470,000.00 plus NYS Tax, if applicable, f.o.b. Cars, Lima, Ohio. Hodge & Hammond, Inc. will absorb 1/2 the rail freight from Lima, Ohio to rail destination in Riverhead, L. I.

Terms of Payment:

10% on signing of order

70% when last car arrives at siding

20% due 60 days from shipment provided

N. Y. Air Pollution & Automation approval
has been received.

It is further understood that Ray Lynn will be on your Jobsite from date of arrival of plant to plant completely stacked.

Exhibit A, Annexed to Foregoing Complaint

BLH Serviceman at jobsite from date of plant arrival to plant stacked.

If desired a 400 bbl. Mineral filler Silo, if purchased prior to Sept. 1, 1970, would be available at a price of \$8840.00 f.o.b. Cars, Lima, Ohio. Terms: Net Cash on arrival.

Ray Lynn has further promised to supervise plant being dismantled and erected on second site May 5th to May 15th, 1971.

Plant is to produce 400 TPH @ 5% moisture, 5% minus 200 mesh material, and guaranteed to meet New York State Air Pollution and Automation specifications.

Plant is to be shipped so as to arrive at destination siding by Feb. 5th, 1971 and in operating condition by March 27th, 1971, provided that Lizza Industries provides the necessary manpower and machinery and transportation as required by Ray Lynn and/or the BLH Serviceman to complete the erection by the March 27th, 1971 date.

Very truly yours,

HODGE & HAMMOND, INC.

JOHN R. DIEHL, Manager

Accepted By:

Lizza Industries, Inc.

by: Carl Lizza, Jr., Sec'y

Exhibit A, Annexed to Foregoing Complaint

*Per letter of November 12th, 1968, based upon the following conditions, the dust collection system for the plant will comply with the New York Air Pollution Code as of 2/6/68:

1. Production rate of 400 TPH with 5% external moisture removal from the aggregate.
2. Approximately 5% or less of minus 200 mesh material in the feed to the dryer.
3. A good grade of fuel oil is used.
4. The exhauster CFM output is properly adjusted.
5. The temperature of the gases is in a good operating range. (250° to 300°.)

10,000# H. D. Semi-Portable Asphalt Plant (400 T.P.H.)

ITEM	Description	Price
A.	<i>Basic Plant Tower</i> (Less Screen & Bin Unit)	
	Fully enclosed hot stone elevator with 18" x 10" x 10½" buckets on #S-856 chain and 40 HP, 1800 RPM electric motor.	
	Overflow and Oversize Chutes and Storage bin 135 cu. ft. working capacity Hot Aggregate Weight Box, Suspension mounted with 12,000 lb. capacity springless dial scale.	
	Patented Pressure Injection System with 20HP, 1800 RPM Injection Pump Motor.	
	Asphalt Line Thermometer.	

Exhibit A, Annexed to Foregoing Complaint

200 gal. capacity Heated Asphalt Weight Bucket with counterweighted lever system and 1,000# capacity springless dial scale.

10,000 lb. rated capacity Twin-Shaft Pug Mill Mixer with patented externally removable segment liners.

Jacketed spray bar and plant lower asphalt piping.

Circulating Hot Oil Jacket on Mixer.

Air cylinder operation of mixer discharge gate, bin gates, weight box gate, asphalt injection valve and asphalt bucket filler.

Run-around mixer paddle arrangement with Ni-hard Mixer tips.

Fully enclosed mixer drive gear reduction unit.

Anti-friction bearings throughout.

200 HP, 1200 RPM Mixer drive motor.

9 ft. Plant tower legs on 48" piers-foot of hot elevator on datum.

12" plant Scavenger Dust Piping.

Necessary drives, plant framing, ladders, walkways and railings.

60' x 18 ft. Symons, 3½ deck Vibrating Screen with 25 HP, 1800 RPM, TEFC, electric motor and five (5) compartment, 110 ton capacity Hot Aggregate Storage Bin.

Externally heated asphalt bucket.

Exhibit A, Annexed to Foregoing Complaint

Five (5) High Level Bin Indicators—plus five (5) Low level indicators.

Dual asphalt system on tower.

\$120,285.00

B. *Dryer 120" x 40 ft.*

Perfo Lifters

Spiral Feeding Flights

Rolled Steel Tires

Cradle Chain Drum Drive

Single Flanged Trunnions

Hot End Cowling

Seal Ring

Center Bottom Discharge

Aggregate Inlet Chute

Two (2) 75 HP, 1800 RPM Electric Motors

Anti-friction Bearings

Dryer Supports

\$56,725.00

C. *Dryer Transport Equipment consists of:*

Three (3) spring mounted axles with Equalizers, twelve (12) 20 x 7:50 steel wheels: 9:00 x 20, 12 ply rating pneumatic tires; air brakes, 5th wheel plate and pin.

\$ 5,505.00

Exhibit A, Annexed to Foregoing Complaint

D. *Oil Burner, Manual Type*

Low Pressure-Air atomizing-Genco Model FP-162,
100 HP, 3600 RPM electric motor.

Conical Firebox with hammered-in refractory in
place.

Ignition cone

Separate Support Frame

Fuel Oil Pump

Combination oil-gas burner included.

\$14,080.00

E. *Automatic Gencontrol FP-162 Burner,*

Upright cabinet, pushbutton start, flame modulat-
ing controls, indicator lights, temperature recorder
controller. Auto-manuel switch, weatherproof con-
trol panels, Hi-limit stack temperature control,
flame safeguards (for oil only)

Combination oil-gas Gen-control

Advance temperature Detector (ATD) in dryer ex-
haust duct.

\$7,929.00

F. *Burner Transport Equipment* consists of:

Single Axle, Two (2) 11:00 x 20, 12 ply rating
pneumatic tires (must be removed when burner
frame is connected to dryer)

*Exhibit A, Annexed to Foregoing Complaint*G. *Dust Collector-Model 2126D*

\$ 1,050.00

Two (2) 10' 6" diameter by 18 ft. long horizontal cyclones. Dust gathering and transfer screw for discharge to boot of hot stone elevator 54" dust piping-dryer to exhauster

Heavy duty exhauster with 200 HP, 1800 RPM motor.

One (1) 7½ HP, 1800 RPM motor for gathering and transfer screw.

Stationary frame.

\$38,305.00

H. *Transport Equipment for Cyclones Only*
(Exhauster transported separately)

Each cyclone will be transported on its own transport type frame w/ gooseneck, single axle w/ single 7:00 x 20, 10 ply tires and air brakes.

\$ 3,075.00

J. *Air Compressor*

82 C&M capacity, 130 gal. Air Receiver; 110 p.s.i., 15 HP, 1800 RPM electric motor, magnetic line starter.

\$ 2,530.00

*Exhibit A, Annexed to Foregoing Complaint***L. *Wet Tube Washer-Model 2126-W***

Two (2) 10' 6" dia. x 18 ft. long horizontal tubes.
 84" x 25 ft. stack; water spray piping and nozzles.
 Stationary frame

Dry Collector to wet washer dust piping

\$16,535.00

M. *Transport Equipment for Horizontal Tubes*

Each tube will be transported on its own transport type frame with gooseneck, single axle with single 7:00 x 20, 10 ply tires.

\$ 3,075.00

N. *Water Pump*

Recirculating type 2" x 3" x 8½", 20 HP, 3600 RPM, direct coupled electric motor.

\$ 1,740.00

O. *Electrical Control Center*

Electrical Control Center for 3/60/440 volt service includes one (1) weatherproof cabinet mounted on Operator's platform with main breaker and controls for motors on mixer, hot elevator, screen, dryer, injection pump and exhauster. Includes one (1) 5 KVA Transformer for 110 volt service. Tower motors, (Mixer, hot elevator, screen, injection pump) are wired in complete rigid or flexible conduit. In-coming power wiring to control center not included. Cables or wiring between con-

Exhibit A, Annexed to Foregoing Complaint

trol center and outlaying motors not included; no metering section is furnished. Magnetic reduced voltage starters for mixer, dryer, burner-blower and exhauster only-All other starters are Across-the-line.

Burner-Blower (Mag. R.V. Starter)
 Fuel Oil Pump
 Two (2) Dust gathering and transfer screws
 Dust transfer screw
 Asphalt circulating pump
 Air Compressor (Breaker only)
 Hot oil heater (Breaker only)
 Dust Screw Conveyor
 Water pump
 Multiclone Transfer Screw

\$16,435.00

P. *Trench Type Cable* for Interconnection between control center and outlaying motor for exhauster. (portable cable for exhauster impractical)

SO&G Cables for - Dryer
 " " " - Burner Blower
 " " " - Fuel Oil Pump
 " " " - (2) Dust gathering screws
 " " " - Asphalt Pump
 " " " - Air Compressor
 " " " - Hot Oil Heater
 " " " - Water Pump
 " " " Multiclone Transfer Screw

\$3,405.00

Exhibit A, Annexed to Foregoing Complaint

- Q. *Model 117-9; 9VGR-10T Multiclone* with wear shields on first row outlet tubes, bolted inlet and outlet connection, special BLH hopper outlet flange, and bolted hopper.

\$25,519.00

- R. *For-Four (4) Hot Bins Only*

Wiscel fully automatic preset type asphalt batching unit; controls the weight of five (5) aggregates, one (1) dust and one (1) asphalt; empties the aggregate weigh box; controls a specified dry mix cycle; empties asphalt weight bucket; controls a specified wet mix cycle; opens the mixer gate; dumps the complete load and closes the mixer gate.

Includes one (1) set presets under lockable glass door and material in a suspension compensators for Seven (7) materials, five (5) aggregates, one

Exhibit A, Annexed to Foregoing Complaint

(1) dust, one (1) asphalt; includes truck size batch selector ceunter, selector switch for 1 of 2 asphalts; total batch counter. Also included are provisions for future addition of Ticket Printer or strip chart recorder, at which time scale heads must be returned for alterations.

Ten (10) Hi-Lo Bin lights

Load Counter (Required in New York State)

\$10,080.00

For Punch Card Kit with Plastick lockable window; 100 pre-printed heavy plastic cards and hand punch.

\$2,780.00

Ticket Printer (NCR Type)-with individual tickets, electro-mechanical ticket printer employs an NCR printing device with 10' of cable with plug and receptacle connections.

Printed mounted on separate control enclosure. Includes Digital 24 hour clock with visual readout; printer prints cumulative weights of Aggregates, weight of asphalt, cumulative batch totals and final load total. Also includes 10,000 sets of five (5) Part individual feed pre-numbered tickets—with Tare Printing.

\$12,395.00

- T. 35' x 10' House Trailer for BLH-Madsen Asphalt Plant with gas/oil furnace, floor registers; Double 5/8" plywood floor with Vinyl Asbestos tile; reinforced frame. Control room approximately 10' x 20'6" office room 10' x 10', including space for wash room, fluorescent light fixtures in control room and office room.

Exhibit A, Annexed to Foregoing Complaint

Four (4) wheels on tandem axle with 12 volt electric brakes; towing kit consisting of 2-5/16" hitch ball, brake controller and six (6) pole plug connector set; breaker box with main breaker; two (2) exterior doors, 32" x 78" with pull out steps, white aluminum exterior with expansion joints; quick disconnect panel; closet 1½' x 4' and two (2) exhaust fans. Complete washroom with sink, stool, water heater, and medicine cabinet. Air conditioning-two (2) 1 ton, 230 volt, 1 phase wall mounted units (these units require, and price includes, 15 KVA transformer mounted in control center in lieu of 5 KVA transformer normally supplied)

Cabinet for Ticket Printer

\$7,210.00

U. *Installation of Automatic Batching System*

Includes mounting remote dial heads and operator's console; fabricated pedestals for asphalt and aggregate dial heads; installation in interconnecting wiring between console scale heads and quick disconnect panel.

Over & Under Check

\$1,540.00

Installation of Automatic Burner Control

Includes mounting of console unit and wiring to quick disconnect panel.

Installation of Remote Control Cabinet for Syntron Feeders.

Includes mounting of cabinet and wiring to quick disconnect panel.

*Exhibit A, Annexed to Foregoing Complaint**Installation of Remote Pushbutton Station*

Includes mounting of cabinet and wiring to quick disconnect panel.

\$1,345.00

V. *Remote Application for BLH-Madsen Asphalt Plants.*

For remote application of the automation unit within 50' of the Centerline of the Tower - Includes junction box on tower unit; special cable with quick disconnects; also includes two (2) remote dial heads.

For remote application of the Syntrol Feeder control cabinet within 50' of the centerline of tower - includes portable power cable with quick disconnects from the electrical control center to the remote location.

For remote application of burner control unit within 50' of centerline of tower - includes cables to burner and control center with quick disconnects.

For a remote pushbutton station located within 50' of the centerline of the tower - includes pushbutton for all motors with plant, cable to electrical control center of tower and quick disconnects.

\$7,385.00

W. *Two (2) Detroit Diesel Engine Generator Sets;*

480 volt, 3 phase, 60 Hertz, One (1) 400 KW Model #7163-7305 16V-71T and one (1) 350 KW, Model #7163-7000; 16V-71 includes engine generator set with 3% Governor and $\pm 1\%$ Voltage Regulation; air cleaner; radiator and core guard 125°F. Max. air temp., blower fan and guard, safety controls and gauges for Hi-water temperature low oil pressure; low fuel pressure; sub-base and fuel tank, electric starter; electric starting generator; fuel

Exhibit A, Annexed to Foregoing Complaint

priming pump where needed, sheet metal housing, side doors, exhaust pipe and rain cap, and switch board to include AC Ammeter, A.C. Voltmeter, Combination Ammeter Voltmeter switch, voltage adjust rheostat, main line circuit breaker, shunt trip, frequency meter and hourmeter.

\$68,040.00

- X. Cold Aggregate Feed System consists of five (5) 10' x 14' Portable "in-line" Cold Feed Compartments. Capacity of each compartment 50 tons. Total capacity 250 tons including Transport Type Frame, Bins, 30" gathering conveyor, drive, starters and breakers installed in plant control center.

Five (5) F440 Syntron Feeders (w/standard "C" Controller)

Syntron Controls for individual and master control for four (4) Syntrons.

Breaker and Sequential Contactor for Syntrons mounted in plant control center. 36" x 80' inclined conveyor to dryer includes Pylon 3-ply belt, speed reducer drive, 20 HP, 1800 RPM motor with necessary "A" frame supports and starters and breakers for inclined cold feed conveyor installed in plant control center.

Includes Remote Application of the Syntron Feeder Control Cabinet within 50' of the centerline of the tower with portable power cable and quick disconnects from the electrical control center to the remote location.

\$40,995.00

- Z. TBW-25, 25,000 gal. Portable Asphalt Tank includes 4" asphalt circulating pump.

\$26,400.00

Affidavit of Lester Kissel, Dated May 29, 1973.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BLH, INCORPORATED,

Plaintiff,

against

HODGE & HAMMOND, Inc.,

Defendant.

State of New York,
County of New York, ss:

LESTER KISSEL, being duly sworn, deposes and says:

1. I am of counsel to the firm of Seward & Kissel, attorneys for plaintiff BLH, Incorporated ("BLH"), and am familiar with the facts of this action. I make this affidavit in opposition to defendant's motion for an order: (1) pursuant to Rule 14 of the FRCP to obtain leave to serve and file a third-party summons and complaint against Lizza Industries, Inc., and its subsidiary, Mid-hampton Asphalt Corp. (both hereinafter named "Lizza"), (2) dismissing the complaint and (3) requiring plaintiff BLH to remove to this Court an action pending in the Supreme Court of the State of New York, County of Nassau (the "Nassau action"), and (4) alternatively requesting (in an affidavit, not in its notice of motion) to stay this action pending a determination of the Nassau action.

2. Defendant Hodge & Hammond, Inc. ("H&H") is not and never was an agent of plaintiff BLH. The only relationship between plaintiff and defendant, when it existed, was this: plaintiff sold certain of its products to

Affidavit of Lester Kissel, Dated May 29, 1973

defendant H&H. It, in turn, as an independent contractor, sold these products, manufactured by plaintiff, within a limited territorial area. Pursuant to the establishment of this relationship, plaintiff and defendant entered into a "Distributor's Agreement" (the "Agreement") on March 15, 1969 and subsequently amended on August 1, 1970. Paragraph 20 of that Agreement specifically states that defendant lacks any authority to act as an agent of plaintiff:

"Independent Contractor: Distributor [H&H] shall at all times act as independent contractor and shall not transact any business in the name of the Company [BLH], or obligate the Company in any manner, character, or description. This Agreement shall not be construed as constituting Distributor as an employee or agent of the Company, for any purposes whatsoever, and the Agreement does not vest Distributor with the power or authority to make adjustments with customers on behalf of the Company or otherwise bind or obligate the Company in any respect whatsoever."

Under this Agreement, plaintiff contracted directly with defendant to sell certain products to defendant. Defendant in its capacity as an independent contractor would then, at its option, contract directly with third-parties to sell these products.

3. Pursuant to this Agreement, plaintiff entered into two separate contracts of sale with defendant. In or about January of 1971, plaintiff sold and delivered a 10,000 pound asphalt plant to defendant, and, on information and belief, this plant has been in operation for more than two years. Defendant, however, has not made full payment for this plant and owes plaintiff \$74,871.45. In or about April 1971, plaintiff sold and delivered a 6,000 pound asphalt plant to defendant. This plant

Affidavit of Lester Kissel, Dated May 29, 1973

also, on information and belief, has been in operation for more than two years. Although neither defendant nor anyone else has complained about the operation of this plant, defendant has paid plaintiff nothing for it. Defendant has owed plaintiff \$218,429.30 for this plant for more than two years. Thus, plaintiff, a Delaware corporation, commenced this action against defendant, a New York corporation, for \$293,300.75, the total amount owing for both of these asphalt plants.

4. Defendant by separate contracts of sale between only itself and Lizza, sold these two asphalt plants to Lizza. One of these contracts is annexed as an exhibit to defendant's motion. Plaintiff was not a party to either of these contracts.

5. Defendant asserts by its motion and answer in this action that there was no contractual relationship between plaintiff and defendant, that defendant did not act in the capacity of a purchaser, but rather, as an agent for plaintiff and merely received these asphalt plants as a conduit to Lizza.

6. Lizza, a New York corporation, commenced the Nassau action against defendant H&H on May 31, 1972, by service of a summons without a complaint, but merely left a copy of the summons for BLH with defendant H&H. Defendant H&H, however, was not BLH's agent for service of process.

7. BLH demanded a copy of the complaint in the Nassau action from plaintiff Lizza in September of 1972, but no copy was served on BLH and plaintiff Lizza defaulted.

8. On January 3, 1973, plaintiff commenced this action against defendant. Thereafter, on January 26, 1973, plaintiff Lizza, although in default, sent a copy of the complaint in the Nassau action to BLH.

Affidavit of Lester Kissel, Dated May 29, 1973

9. Since Lizza was more than three months in default in responding to BLH's demand for the complaint, BLH returned the complaint. Plaintiff Lizza moved to compel BLH to accept it and BLH, contending that Lizza did not obtain personal jurisdiction over it, cross-moved to dismiss the Nassau action. The decision on that motion, a copy of which is annexed as Exhibit A, determined that defendant H&H was not an agent of BLH for service of process but referred the motion for a hearing to determine the identity of a Harold Hughes. Mr. Hughes was the individual at H&H's corporation with whom the process server left the copy of Lizza's summons for BLH. The process server, in his affidavit of service, described him as a managing agent of BLH. Mr. Hughes, however, was merely an employee of defendant H&H and, like H&H, was not an agent of BLH for service of process. The hearing that will determine his identity has not as yet been held.

10. Lizza alleges in the Nassau action that defendant H&H represented to Lizza it was an agent for BLH, that Lizza had a written contract with H&H for the purchase of a 10,000 pound asphalt plant and that warranties and representations made to Lizza by defendant H&H, pursuant to their contract, were not fulfilled.

11. I therefore respectfully request that defendant's motion be denied.

(Sworn to by Lester Kissel, May 29, 1973.)

**Exhibit A, Annexed to Foregoing Affidavit of Lester
Kissel—Order.**

SUPREME COURT, STATE OF NEW YORK,

NAASSAU COUNTY,

Special Term, Part 1.

Present:

Hon. Bernard McCaffrey, Justice.

LIZZA INDUSTRIES, Inc., and MIDHAMPTON ASPHALT CORP.,

Plaintiffs,

against

HODGE & HAMMOND, Inc., and BALDWIN-LIMA-HAMILTON
CORPORATION,

Defendants.

Index Number 3396, 1973

Motion Date March 16, 1973

Motion Cal. Number 38 & 39

The following papers numbered 1 to read on
this motion to compel acceptance of complaint and cross
motion to dismiss action

Papers
Numbered

Notice of Motion
Cross Motion

Upon the foregoing papers it is ordered that this motion by plaintiffs for an order compelling defendant, Baldwin-Lima-Hamilton Corporation (BLH), to accept late service of their complaint and the cross-motion by

Exhibit A, Annexed to Foregoing Affidavit of Lester Kissel

that defendant for an order dismissing the action are both respectfully referred to Special Term, Part II of this Court for hearing and determination.

The cross-motion asserts as alternative grounds for dismissal the Court's lack of personal jurisdiction (CPLR 3211[a] 8) and plaintiffs' failure to serve the complaint within the time prescribed (CPLR 3012[b]).

The attack upon the Court's jurisdiction is based upon the contention by defendant, BLH, supported by documentary evidence, that defendant, Hodge & Hammond, Inc. (H & H), at whose office the summons was purportedly served on BLH, was not an agent authorized to accept service on its behalf. While the argumentative affidavit of plaintiffs' attorney, submitted in opposition to the cross-motion, is insufficient to establish an agency on the part of H & H, an examination of the affidavit of purported service of the summons reveals that one Harold Hughes, and not H & H, was alleged by the process server as the managing agent of defendant, BLH. Since the papers, submitted in support of the cross-motion, are silent as to the status of Mr. Hughes, the Court considers a hearing on the issue of jurisdiction to be warranted.

If it should be determined, after a hearing, that the Court does lack personal jurisdiction of defendant, BLH, the subject of plaintiffs' motion would be rendered moot. For that reason the motion, as well as the cross-motion, is being referred to Special Term, Part II.

Subject to the approval of the Justice presiding at Special Term, Part II, the hearing shall be conducted on April 9, 1973 at 9:30 A.M.

Dated 3-23-73

J. S. C.

**Reply Affidavit of Leland Stuart Beck, Dated May 30,
1973.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of Nassau, ss:

LELAND STUART BECK, being duly sworn deposes and says:

That I am of counsel to Paul V. Rudden the attorney for the defendant in the above captioned matter. I make this affidavit in answer to the affidavit of Lester Kissel, Esq. sworn to May 29, 1973.

In his affidavit, Mr. Kissel makes reference to an Order of Judge Bernard F. McCaffrey of the Supreme Court of the State of New York which refers a motion by the plaintiffs in this action to Special Term Part II of the Supreme Court of Nassau County for a hearing. At the present time, there has been no order dismissing the complaint of Lizza Industries, Inc. *et al.* against the plaintiffs in this action, which case is presently pending before the Supreme Court of Nassau County.

What Mr. Kissel's affidavit fails to reveal is information which his office has communicated to me since the early part of May, 1973. The plaintiff in this action has accepted service of process in the State Court action and has requested an extension of time until June 13, 1973 to interpose an answer in the State Court proceedings. At the time that the plaintiff in this action appears in the State Court action as a defendant, the issues to be resolved in this litigation will be before a convenient forum, the Supreme Court of the State of New York held in and for Nassau County.

Mr. Kissel, raises issues before this Court which are already before the Supreme Court of Nassau County;

*Reply Affidavit of Leland Stuart Beck, Dated May 30,
1973*

to wit: whether or not the original service of process on the plaintiff by Lizza Industries, Inc. was proper. In view of the subsequent service upon the plaintiff herein by Lizza Industries, Inc. and their intention to appear in that State Court action such issues are clearly moot.

It must be obvious from the mere recitation of the nature of this action that Lizza Industries, Inc. and Midhampton Asphalt Corp. are necessary parties to any litigation which will resolve the issues raised in this case. The whole issue to be determined in this case is whether the machinery delivered by the plaintiff to Lizza Industries, Inc. and Midhampton Asphalt Corp. performed as warranted by this plaintiff.

WHEREFORE, it is respectfully requested that the motion made by the defendant for necessary relief in order to insure that all of the necessary parties are before one convenient forum be granted.

(Sworn to by Leland Stuart Beck, May 30, 1973.)

Opinion of Judge Charles Metzner, Dated November 14, 1973, on Plaintiff's Motion for Summary Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

METZNER, D. J.:

Plaintiff seeks summary judgment or at least partial summary judgment against defendant.

On March 15, 1969, the parties entered into what is denominated as a "Distributor's Agreement." However, that agreement clearly states that the plaintiff granted to the defendant "the right to purchase for resale." It further provided that the defendant "shall at all times act as independent contractor," and that this "Agreement shall not be construed as constituting Distributor [defendant] as an employee or agent of the Company [plaintiff] for any purposes whatsoever" One of the product lines which the defendant had the right to purchase for resale is the "BLH Line Madsen Asphalt Equipment." Attached to the agreement as Exhibit "A" is a schedule of the discounts for "BLH-Madsen Asphalt Plants."

Plaintiff presents two claims upon which he seeks recovery. The first is for the balance of the purchase price on the sale of a large asphalt plant concerning which there is prior litigation pending in the New York Supreme Court in Nassau County. The parties here are co-defendants in that action. The defendant here has interposed a cross claim in the state court action. Since the issues regarding this large asphalt plant will be determined in that action, I see no reason for this court, in an action instituted six months later, to interfere with those proceedings. If nothing else, this is a decision dictated by sound judicial administration, and the motion addressed to the first claim is denied.

*Opinion of Judge Charles Metzner, Dated November 14,
1973, on Plaintiff's Motion for Summary Judgment*

The second claim relates to a smaller asphalt plant for which plaintiff alleges the entire purchase price is due. This plant is not the subject of the cause of action in the Nassau County proceeding, and presents a different problem. No complaint about the performance of this plant has been made.

The president of defendant corporation has submitted an affidavit in which he states that his corporation does not stock or service or have any technical experience in connection with asphalt plants, and that "whatever our relationship may be in the sale of machinery that we stock and inventory, the relationship between Baldwin Lima Hamilton and Hodge & Hammond for the purpose of the sale of asphalt plants was strictly one of manufacturer and salesman."

This statement completely negatives the express wording of the contract. No explanation for the variance is furnished by defendant. I gather that despite the use of the words "Madsen Asphalt Equipment" in the body of the agreement, and "Madsen Asphalt Plants" in the schedule attached to the agreement, the parties are speaking about the same product line. That being so, and the defendant makes no point of the difference in wording, the motion for summary judgment on the second claim is granted.

So ordered.

Dated: New York, N. Y.

November 12, 1973

CHARLES M. METZNER
U. S. D. J.

Notice of Motion for Summary Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Please Take Notice that upon the annexed affidavit of James B. M. McNally, sworn to September 7th, 1973, the pleadings, and the annexed exhibits, the undersigned will move this Court before United States District Court Judge Charles M. Metzner in Room 2210 of the United States Courthouse, Foley Square on the 17th day of September, 1973 at 10 a.m. for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting:

1. Summary judgment in favor of plaintiff and against defendant, or
2. Partial judgment in favor of plaintiff against defendant, or
3. A preference for the trial of this case.

Please Take Further Notice that answering affidavits shall be served at least three (3) days before the time of the hearing of said motion.

New York, New York
September 7th, 1973

SEWARD & KISSEL
Attorneys for Plaintiff
63 Wall Street
New York, New York 10005

To:

Paul V. Rudden
By Leland Stuart Beck
Attorneys for Defendant
288 Old Country Road
Mineola, Long Island, New York

**Affidavit of James B. M. McNally in Support of Motion
for Summary Judgment.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES B. M. McNALLY being duly sworn deposes and says:

1. That he is an attorney and counsellor at law duly admitted to practice as such and is counsel to Seward & Kissel, attorneys for the plaintiff, and makes this affidavit upon his personal knowledge.

2. That in or about January 1971 plaintiff sold and delivered to the defendant one 10,000 pound asphalt plant (hereinafter referred to as the "large plant") which defendant accepted.

3. Defendant made partial payment for said large plant but still owes plaintiff the sum of \$74,871.45.

4. That in or about April 1971 plaintiff sold and delivered to defendant one 6,000 pound asphalt plant (hereinafter referred to as the "small plant") which defendant accepted.

5. Defendant has refused to pay for said small plant and owes plaintiff \$218,429.30.

6. The summons and complaint herein were filed on January 1, 1973.

7. Defendant served its answer to the complaint and issue was joined on February 22, 1973. Defendant does not deny the purchase of the two plants referred to in this affidavit but states that the defendant acted as the exclusive sales agent for a disclosed principal, the plaintiff herein, and therefore the defendant is not indebted to the plaintiff. In other words, the sale was made to third-parties and defendant acted as an agent

*Affidavit of James B. M. McNally in Support of Motion
for Summary Judgment*

in that sale. Defendant's answer, Exhibit B attached hereto, paragraph 2, 3, and 4.

8. Further in the answer the defendant alleges that a claim has been made against it to the effect that the plants were sold to Lizza Industries, Inc. and Midhampton Asphalt Corp. by the plaintiff herein and that one plant was defective. This claim was made in an action pending in the Nassau County Supreme Court. *There is no allegation of a defect in the plants made by defendant on its own behalf. Further, the alleged claim by Lizza Industries, Inc. and Midhampton Asphalt Corp. refers only to the large plant. There is no claim by anyone of a defect in the small plant.* See answer of defendant attached hereto paragraph 4, Exhibit B.

9. Attached hereto, as Exhibit, A, is a copy of a "Distributor's Agreement" between the plaintiff herein and the defendant, entered into on March 15, 1969 and amended on August 1, 1970. Attention is specifically called to Paragraph 20 of this Agreement which states:

"INDEPENDENT CONTRACTOR: Distributor [Hodge & Hammond, Inc.] shall at all times act as independent contractor and shall not transact any business in the name of the Company [BLH, Incorporated], or obligate the Company in any manner, character, or description. This Agreement shall not be construed as constituting Distributor as an employee or agent of the Company, for any purposes whatsoever, and the Agreement does not vest Distributor with the power or authority to make adjustments with customers on behalf of the Company or otherwise bind or obligate the Company in any respect whatsoever."

Attention is also called to the third paragraph, page 2 of an amendment part of Exhibit A which contains the

*Affidavit of James B. M. McNally in Support of Motion
for Summary Judgment*

following language. BLH (the plaintiff herein) "shall not be obligated or liable for direct, indirect or consequential damages with respect to the sale or use of the product." The conclusory statement of agency avails the defendant nothing. The relationship between the parties is clearly set forth in the Agreement annexed. Paragraph 20 thereof delineates with great care the nature of the relationship. There is not a single denial of the purchase by the defendant of the plants, nor is there a single statement by the defendant of an alleged claim of defect. The only claim of defect is that referred to by Lizza Industries, Inc. and Midhampton Asphalt Corp. in a Nassau County Supreme Court action and that alleged claim refers only to the large plant. The plaintiff herein has no contractual relationship directly or indirectly with either of those corporations.

10. The purchase order for the large plant, Exhibit C, which order is supplementary to the Agreement herein referred to, is purchase order No. S5508 and dated August 5, 1970. This purchase order is on the letterhead of the defendant Hodge & Hammond, Inc., Construction Equipment, 720 Garrison Avenue, New York 59 New York and is directed to Baldwin-Lima-Hamilton Corp. (the former name of the plaintiff herein), Box L, Lima, Ohio. The purchase order consists of three pages setting forth terms of payment which are outlined on page three thereof:

Terms of Payment:

- 10% on signing of order
- 70% when last car arrives at siding
- 20% due 60 days from shipment provided NY Air Pollution & Automation approval has been received.
- 3% Cash on entire Net Price.

*Affidavit of James B. M. McNally in Support of Motion
for Summary Judgment*

Plaintiff's acknowledgment of the purchase order, including shipping instruction, is dated August 12, 1970 and defendant's acceptance of plaintiff's terms of sale is dated September 10, 1970.

11. The purchase order for the small plant, Exhibit D is purchase order #S5558 dated the 18th day of February 1971. Acceptance is dated February 19, 1971.

12. There is absolutely no defense to plaintiff's claim and the plaintiff therefore respectfully requests summary judgment in the full amount of \$293,300.73.

13. In any event, there is no claim whatsoever of defect with reference to the 6,000 pound asphalt plant (the small plant) by anyone. Without withdrawing our claim for summary judgment in full, and in the event the Court feels there is a question of fact involved (which we cannot see) in regard to the large plant, we respectfully ask this Court to grant partial summary judgment in reference to the small plant.

14. We call attention to the fact plaintiff entered into two separate contracts of sale with this defendant. In or about August, 1970 plaintiff sold and delivered the 10,000 pound asphalt plant, referred to as the large plant, to defendant. This plant has been in operation for more than two years. Defendant has not made full payment and owes plaintiff \$74,871.45 on this sale. In or about February, 1971 plaintiff sold and delivered the 6,000 pound asphalt plant referred to as the small plant to defendant. This plant has been in operation for more than two years. No one has made any complaint about the operation of this plant. Defendant has paid plaintiff nothing for it. Defendant has owed plaintiff \$218,429.30 on this plant for more than two years.

*Affidavit of James B. M. McNally in Support of Motion
for Summary Judgment*

In the aggregate the defendant owes this plaintiff \$293,300.75 for both of these plants which have been in constant use for two years.

15. Annexed as Exhibit E is the answer of the defendant herein in the action pending in the Supreme Court, Nassau County between Lizza Industries, Inc. and Mid-hampton Asphalt Corp., plaintiffs against the plaintiff and the defendant herein. Paragraphs 12-21 inclusive of said answer have reference to the 10,000 pound asphalt plant, the large plant, purchased by the defendant in August 1970. The invoice price of said machine to the defendant herein, as appears from Exhibit C, is \$412,161.00. Paragraph 19 of said answer alleges that Lizza Industries, Inc. is indebted to this defendant for said machine in the sum of \$456,484.85 on which it has received (Paragraph 20) the sum of \$366,000.00, and (paragraph 22) that Lizza is indebted thereon in the sum of \$90,484.85.

16. Annexed as Exhibit F is plaintiffs statement of defendants account showing the charges, payments, and credits, as well as the due dates of the various items. The balance shown thereon is \$293,770.20, from which has been excluded excise taxes resulting in the amount demanded in the complaint of \$293,300.75. Repeated demands have been made for payment of the balance herein which have been refused principally on the ground that the defendant characterizes itself, without legal basis, as plaintiff's agent, and because of various complaints made by the defendant's customer, Lizza, wholly unrelated to the 6,000 pound asphalt plant (small plant) which is the subject of the second cause of action. The alleged claims of the defendant's said customer relate solely to the 10,000 pound asphalt plant (large plant) the subject of the first cause of action.

*Affidavit of James B. M. McNally in Support of Motion
for Summary Judgment*

17. The defendant by its agreement with the plaintiff hereto annexed as Exhibit A is precluded from any claim for damages other than the cost of repairing defects. No compensatory damages may be awarded to the defendant under the express provisions of said agreement quoted at paragraph 2, page 2 of the amendment to Exhibit A. Moreover, the defendant has failed to assert any claim for breach of warranty to this defendant.

18. Further, this is a relatively simple good sold and delivered case which plaintiff intends, if possible, to prosecute with vigor and dispatch. It is our respectful submission, therefore, that in the event relief by way of summary judgment is denied, that plaintiff, by way of alternate relief, be accorded a trial preference in the exercise of discretion and in the interests of justice.

19. The defendant herein has moved before this Court in this action for the following relief:


- a. Dismissal of our complaint.
- b. Removal of the Nassau County action to this Court.
- c. Filing and serving of a third-party summons and complaint.
- d. Stay of this United States District Court action
(See affidavit of Leland Stuart Beck, verified February 21, 1973.)

Said motion is *sub judice*, and, in our opinion, reflects defendant's intention to delay disposition of this action on the merits.

WHEREFORE plaintiff requests the relief as prayed for above. Permission to argue requested by plaintiff.

(Sworn to by James B. M. McNally, September 7, 1973.)

**Exhibit A, Annexed to Affidavit of James B. M. McNally
—Agreement.**

(See opposite page.) 

45a

**Exhibit B, Annexed to Affidavit of James B. M.
McNally—Answer.**

Same as Answer printed *supra*, pages 8a and 9a.

47a

**Exhibit C, Annexed to Affidavit of James B. M. McNally
—Letter, Dated August 12, 1970.**

August 12, 1970

Hodge & Hammond, Inc.
728 Garrison Ave.
New York, N. Y. 10474

Subject: 10000# Asphalt Plant
Your Purchase Order No. S-S508
Sales Order No. 56487-70 (S/N 616)
For: Lizza Industries

Gentlemen:

Your subject order has been accepted and entered as shown on the enclosed acknowledgment copy, describing and pricing the equipment to be furnished. Terms of payment, destination, shipping date and shipping instructions are also shown. We appreciate your order and are proceeding at once with its manufacture. In order to avoid any misunderstanding or confusion, however, we ask that you carefully read your acknowledgment as well as the following points of clarification and let us have your acceptance by signing and returning the duplicate copy of this letter immediately:

1. BLH is to furnish only these items and equipment specified on the enclosed acknowledgement.

2. If this is a different model plant from any that you, as a distributor, have installed, we would furnish a service engineer to supervise the complete erection with the following stipulations.

All foundations must be in.

All material furnished by BLH must be at the job site.

All material such as piping, wiring, pumps, tanks, electrical supply, fuel supply, etc. that is

Exhibit C, Annexed to Affidavit of James B. M. McNally

to be furnished by the customer must be readily available and a crew of approximately six men, plus an electrician and adequate equipment to complete installation. This will enable plant to be erected in a reasonable length of time barring weather conditions or other unforeseen problems which might arise.

If for any reason the man works a week or ten days and any material shortage, beyond the control of BLH, exists which hampers the erection, the service representative will instruct the distributor's personnel on further erection procedures and will then leave the job site. He will then return at the time that the material difficulties are overcome.

The erection of an asphalt plant that has not had proper coordination of material prior to the start of the erection can go into six or eight weeks time and this is something that we must discourage.

3. BLH assumes no responsibility for negotiations between you and customer, or others, for work or materials pertaining to the erection, installation and acceptance of the plant and components.

4. BLH will furnish foundation and layout drawings (plan-view and elevation) of the plant. The design and installation of foundations to suit local topography and building codes is the responsibility of others. BLH assumes no responsibility for equipment furnished by others, not furnished by BLH, that may be shown on the layout drawings, Schematic wiring and piping drawings will be provided for equipment furnished by BLH. Plant elevation drawings show driveway clearance under the mixer, foundation height, length of tower legs and relation of plant and components to datum. Any change from the dimensions shown will be at an additional price.

Exhibit C, Anenxed to Affidavit of James B. M. McNally

5. Compliance with State, Local or Municipal Specifications and/or building codes is not guaranteed in this proposal until such specifications and/or codes are submitted to us in detail and agreed to by BLH, at which time our price may be subject to revision.

6. When a bonafide order has been placed for a BLH-Madsen Asphalt Plant and entered into our production schedule, should this order be cancelled there will be a cancellation charge made of 3% of the total list price.

7. As indicated on your order, as well as the enclosed acknowledgement copy, this plant is to comply with the New York State Air Pollution Code, dated February 8, 1968. It is also to comply with New York State specifications on automation.

Our compliance with the Air Pollution Code is based on a plant production rate of 400 TPH, 5% external moisture removal and 4 to 5% minus 200 mesh material in the aggregate.

Our plant will produce 400 TPH of a normal asphaltic concrete mix. However, we can not guarantee a constant 400 TPH rate of production on all of the several New York State specification mixes. For instance, production may be reduced if a high percentage sand mix is being made. If you will provide us with the various mix specifications to be produced, we can give you the corresponding production rates to be expected.

8. Your order specifies the plant is to be shipped to arrive at the destination site by February 5, 1971. We have scheduled your order for shipment February 1, 1971 or sooner. We can not guarantee the arrival date at the destination.

9. Your payment terms are as we agreed, with one exception. We understood, and have so indicated on your acknowledgement copy, that the final payment of

Exhibit C, Annexed to Affidavit of James B. M. McNally

20% is due 59 days from date of shipment, or when the plant is approved by New York State authorities on automation and air pollution, whichever comes first. This last is merely to avoid any substantial delay in final payment, if the authorities take longer than 60 days for approval.

Your prompt response, indicating your acceptance of the order as entered, along with the above points, will avoid delay in placing your order in our production schedule.

We also request that you forward your confirming purchase order indicating complete shipping instructions at your earliest convenience.

Very truly yours,

BALDWIN-LIMA-HAMILTON CORPORATION
Lima Division
Ray Hahn
Sales Order Department Supervisor

RH:ka

cc: Mr. A. D. Bellows
Service Department
Mr. Ray Lynn

Encl.

Accepted: * (See Below)

Hodge & Hammond, Inc.
Distributor

By L. F. Hammond Jr., Vice Pres.

Date: 9/10/70

51a-1

Exhibit C, Annexed to Affidavit of James B. M. McNair

HODGE & HAMMOND, Inc.

CONSTRUCTION EQUIPMENT

720 Garrison Avenue

New York 59, N. Y.

Phone Kilpatrick 2-2400

Att.: Madson, Sales Dept.

To: Baldwin-Lima-Hamilton Corp.

Box L

Lima, Ohio #45802

Order No. S5508

Date August 5th, 1970

Ship To: Lizza Industries, Inc.

(Will advise)

Via: Will advise

Quantity	Name and Description	Price
	Required, Delivery Date	See below
1	New BLH-Madsen 10,000# H. D. Semi-portable Asphalt Plant, 400 TPH and as per specs attached.	
	List Price f.o.b. Lima, Ohio	469360.00
	Include 400 bbl. Mineral Filler Silo, subject to cancellation before 9/1/70.	

Exhibit C, Annexed to Affidavit of James B. McNally

List Price f.o.b. Lima, Ohio	8840.00
---	---------

Total List Price .. f.o.b. Lima, Ohio	478200.00
--	-----------

Net Price f.o.b. Lima, Ohio	404647.00
on Asphalt Plant.	

Net Price f.o.b. Lima, Ohio	7514.00
on 400 Bbl. Mineral Filler Silo	

Total Net Price .. f.o.b. Lima, Ohio	412161.00
---	-----------

Notes: BLH Serviceman at jobsite from date of plant arrival to plant stacked.

Plant is to produce 400 TPH @ 5% moisture, 5% minus 200 mesh material, and guaranteed to meet New York State Air Pollution and Automation specifications.

Per letter of November 12th, 1968 based upon the following conditions, the dust collection system for the plant will comply with the New York Air Pollution Code as of 2/6/68.

1. Production rate of 400 TPH with 5% external moisture removal from the aggregate.

2. Approximately 5% or less of minus 200 mesh material in the feed to the dryer.

3. A good grade of fuel oil is used.

4. The exhauster CFM output is properly adjusted.

5. The temperature of the gases is in a good operating range. (250° to 300°)

Exhibit C, Annexed to Affidavit of James B. M. McNally

Shipt. Plant is to be shipped so as to arrive at destination siding by Feb. 5, 1971 and in operating condition by March 27th, 1971, provided that Lizza Industries provides the necessary manpower and machinery and transportation as required by Ray Lynn and/or the BLH Serviceman to complete the erection by the March 27th, 1971 date.

Terms of Payment:

- 10% on signing of order
- 70% when last car arrives at siding
- 20% due 60 days from shipment provided NY Air Pollution & Automation approval has been received.
- 3% Cash on entire Net Price.

Per (Illegible)

ITEM	Description	Price
A.	<i>Basic Plant Tower</i> (Loss Screen & 8 in Unit) Fully enclosed hot stone elevator with 18" x 10" x 10½" buckets on #3-856 chain and 40 HP, 1800 RPM electric motor. Overflow and Oversize Chutes and Storage bin 135 cu. ft. working capacity Hot Aggregate Weigh Box, Suspension mounted with 12,000 lb. capacity springless dial scale. Patented Pressure Injection System with 20 HP, 1800 RPM Injection Pump Motor. Asphalt Line Thermometer.	

Exhibit C, Annexed to Affidavit of James B. M. McNally

200 gal. capacity Heated Asphalt Weigh Bucket with counterweighted lever system and 1,000-# capacity springless dial scale.

10,000 lb. rated capacity Twin-Shaft Pug Mill Mixer with patented externally removable segment liners.

Jacketed spray bar and plant tower asphalt piping.

Circulating Hot Oil Jacket on Mixer.

Air cylinder operation of mixer discharge gate, bin gates, weigh box gate, asphalt injection valve and asphalt bucket filler.

Run-around mixer paddle arrangement with Ni-hard Mixer tips.

Fully enclosed mixer drive gear reduction unit.

Anti-friction bearings throughout.

200 HP, 1200 RPM Mixer drive motor.

9 ft. Plant tower legs on 48" priers-foot of hot elevator on datum.

12" plant Scavenger Dust Piping.

Necessary drives, plant framing, ladders, walkways and railings.

60" x 18 ft. Symons, 3½ deck Vibrating Screen with 25 HP, 1800 RPM, TEFC, electric motor and five (5) compartment, 110 ton capacity Hot Aggregate Storage Bin.

Externally heated asphalt bucket.

Exhibit C, Annexed to Affidavit of James B. M. McNally

Five (5) High Level Bin Indicators-plus five (5)
Low level indicators.

Dual asphalt system on tower.

\$120,285.00

B. Dryer 120' x 40 ft.

Perfo Lifters

Spiral Feeding Flights

Rolled Steel Tires

Cradle Chain Drum Drive

Single Flanged Trunnions

Hot End Cowling

Seal Ring

Center Bottom Discharge

Aggregate Inlet Chute

Two (2) 75 HP, 1800 Electric Motors

Anti-friction Bearings

Dryer Supports

\$56,725.00

C. Dryer Transport Equipment consists of:

Three (3) spring mounted axles with Equalizers,
twelve (12) 20 x 7:50 steel wheels: 9:00 x 20,
12 ply rating pneumatic tires; air brakes, 5th
wheel plate and pin.

5,505.00

Exhibit C, Annexed to Affidavit of James B. M. McNally

D. Oil Burner, Manual Type

Low Pressure-Air atomizing-Genco Model FP-162,
100 HP, 3600 RPM electric motor.

Conical Firebox with hammered-in refractory in
place.

Ignition cone

Separate Support Frame

Fuel Oil Pump

Combination oil-gas burner included.

\$14,080.00

E. Automatic GenControl FP-162 Burner,

Upright cabinet, pushbutton start, flame modulating controls, indicator lights, temperature recorder controller. Auto-manuel switch, weatherproof control panels, Hi-limit stack temperature control, flame safeguards (for oil only)

Combination oil/gas Gen-control

Advance temperature Detector (ATD) in dryer exhaust duct.

\$ 7,925.00

F. Burner Transport Equipment consists of:

Single Axle, Two (2) 11:00 x 20, 12 ply rating pneumatic tires (must be removed when burner frame is connected to dryer)

Exhibit C, Annexed to Affidavit of James B. M. McNally

G. *Dust Collector-Model 2126D*

\$ 1,050.00

Two (2) 10' 6" diameter by 18 ft. long horizontal cyclones. Dust gathering and transfer screw for discharge to boot of hot stone elevator 54" dust piping-dryer to exhauster

Heavy duty exhauster with 200 HP, 1800 RPM motor.

One (1) 7½ HP, 1800 RPM motor for gathering and transfer screw.

Stationary frame.

\$38,305.00

H. *Transport Equipment for Cyclones Only*
(Exhauster transported separately)

Each cyclone will be transported on its own transport type frame w/ gooseneck, single axle w/ single 7:00 x 20, 10 ply tires and air brakes.

\$ 3,075.00

J. *Air Compressor*

82 CFM capacity, 130 gal. Air Receiver; 110 p.s.i., 15 HP, 1800 RPM electric motor, magnetic line starter.

\$ 2,530.00

L. *Wet Tube Washer-Model 2126-W*

Two (2) 10' 6" dia. x 18 ft. long horizontal tubes. 84" x 25 ft. stack; water spray piping and nozzles.

Exhibit C, Annexed to Affidavit of James B. M. McNally

Stationary frame

Dry Collector to wet washer dust piping

\$16,535.00

M. Transport Equipment for Horizontal Tubes

Each tube will be transported on its own transport type frame with gooseneck, single axle with single 7:00 x 20, 10 ply tires.

\$ 3,075.00

N. Water Pump

Recirculating type 2" x 3" x 8½", 20 HP, 3600 RPM, direct coupled electric motor.

\$ 1,740.00

O. Electrical Control Center

Electrical Control Center for 3/60/440 volt service includes one (1) weatherproof cabinet mounted on Operator's platform with main breaker and controls for motors on mixer, hot elevator, screen, dryer, injection pump and exhauster. Includes one (1) 5 KVA Transformer for 110 volt service. Tower motors, (Mixer, hot elevator, screen, injection pump) are wired in complete rigid or flexible conduit. In-coming power wiring to control center not included. Cables or wiring between control center and outlying motors not included; no metering section is furnished. Magnetic reduced voltage starters for mixer, dryer, burner-blower and exhauster only-All other starters are Across-the-line.

Exhibit C, Annexed to Affidavit of James B. M. McNally

Burner-Blower (Mag.RV Starter)
 Fuel Oil Pump
 Two (2) Dust gathering and transfer screws
 Dust transfer screw
 Asphalt circulating pump
 Air Compressor (Breaker only)
 Hot oil heater (Breaker only)
 Dust Screw Conveyor
 Water pump
 Multiclone Transfer Screw

\$16,435.00

P. *Trench Type Cable* for Interconnection between
 control center and outlaying motor for exhauster.
 (portable cable for exhauster impractical)

SO&G Cables for -Dryer

"	"	"	- Burner Blower
"	"	"	- Fuel Oil Pump
"	"	"	- (2) Dust gathering screws
"	"	"	- Asphalt Pump
"	"	"	- Air Compressor
"	"	"	- Hot Oil Heater
"	"	"	- Water Pump
"	"	"	- Multiclone Transfer Screw

\$ 3,405.00

Q. *Model 117-9; 9VGR-10T Multiclone* with wear
 shields on first row outlet tubes, bolted inlet
 and outlet connection, special BLH hopper outlet
 flange, and bolted hopper.

\$25,515.00

*Exhibit C, Annexed to Affidavit of James B. M. McNally**R. For-Four (4) Hot Bins Only*

Wiscel fully automatic preset type asphalt batching unit; controls the weight of five (5) aggregates, one (1) dust and one (1) asphalt; empties the aggregate weigh box; controls a specified dry mix cycle; empties asphalt weigh bucket; controls a specified wet mix cycle; opens the mixer gate; dumps the complete load and closes the mixer gate.

Includes one (1) set presets under lockable glass door and material in a suspension compensators for Seven (7) materials, five (5) aggregates, one (1) dust, one (1) asphalt; includes truck size batch selector counter, selector switch for 1 of 2 asphalts; total batch counter. Also included are provisions for future addition of Ticket Printer or strip chart recorder, at which time scale heads must be returned for alterations.

Ten (10) Hi-Lo Bin lights

Load Counter (Required in New York State)

\$10,085.00

For Punch Card Kit with Plastic lockable window; 100 pre-printed heavy plastic cards and hand punch.

\$ 2,780.00

Ticket Printer (Nor Type)-with individual tickets, electro-mechanical ticket printer employs an NCR printing device with 10' of cable with plug and receptacle connections.

Exhibit C, Annexed to Affidavit of James B. M. McNally

Printer mounted on separate control enclosure. Includes Digital 24 hour clock with visual readout; printer prints cumulative weights of Aggregates, weight of asphalt, cumulative batch totals and final load total. Also includes 10,500 sets of five (5) Part individual feed pre-numbered tickets—with Tear Printing.

\$12,395.00

T. 35' x 10' House Trailer for BLH-Madsen Asphalt

Plant with gas/oil furnace, floor registers; Double 5/8" plywood floor with Vinyl Asbestos tile; reinforced frame. Control room approximately 10' x 20' 6" office room 10' x 10', including space for wash room, fluorescent light fixtures in control room and office room. Four (4) wheels on tandem axle with 12 volt electric brakes; towing kit consisting of 2-5/16" hitch ball, brake controller and six (6) pole plug connector set; breaker box with main breaker; two (2) exterior doors, 32" x 78" with pull out steps, white aluminum exterior with expansion joints; quick disconnect panel; closet 1½' x 4' and two (2) exhaust fans, Complete washroom with sink, stool, water heater, and medicine cabinet. Air conditioning—two (2) 1 ton, 230 volt, 1 phase wall mounted units (these units require, and price includes, 15 KVA transformer mounted in control center in lieu of 5KVA transformer normally supplied)

Cabinet for Ticket Printer

\$ 7,210.00

Exhibit C, Annexed to Affidavit of James B. M. McNally

U. Installation of Automatic Batching System

Includes mounting remote dial heads and operator's console; fabricated pedestals for asphalt and aggregate dial heads; installation of interconnecting wiring between console seple heads and quick disconnect panel.

Over & Under Check

Installation of Automatic Burner Control

Includes mounting of console unit and wiring to quick disconnect panel.

Installation of Remote Control Cabinet for Syntron Feeders.

Includes mounting of cabinet and wiring to quick disconnect panel.

Installation of Remote Pushbutton Station

Includes mounting of cabinet and wiring to quick disconnect panel.

\$ 1,345.00

V. Remote Application for BLH-Madsen Asphalt Plants.

For remote application of the automation unit within 50' of the Centerline of the Tower-Includes junction box on tower unit; special cable with quick disconnects; also includes two (2) remote dial heads.

Exhibit C, Annexed to Affidavit of James B. M. McNally

For remote application of the Syntron Feeder control cabinet within 50' of the centerline of tower-includes portable power cable with quick disconnects from the electrical control center to the remote location.

For remote application of burner control unit within 50' of centerline of tower-includes cables to burner and control center with quick disconnects.

For a remote pushbutton station located within 50' of the centerline of the tower-includes pushbutton for all motors with plant, cable to electrical control center of tower and quick disconnects.

\$ 7,385.00

W. *Two (2) Detroit Diesel Engine Generator Sets;*

480 volt, 3 phase, 60 Hertz, One (1) 400 KW Model #7163-7305 16V-71T and one (1) 350 KW, Model #7163-7000; 16V-71 includes engine generator set with 3% Governor and $\pm 1\%$ Voltage Regulation; air cleaner; radiator and core guard 125° F. Max. air temp., blower fan and guard, safety controls and gauges for Hi-water temperature low oil pressure; low fuel pressure; sub-base and fuel tank, electric starter; electric starting generator; fuel priming pump where needed, sheet metal housing, side doors, exhaust pipe and rain cap, and switch board to include AC Ammeter, A.C. Voltmeter, Combination Ammeter Voltmeter switch, voltage adjust rheostat, main line circuit breaker, shunt trip, frequency meter and hourmeter.

\$68,040.00

Exhibit C, Annexed to Affidavit of James B. M. McNally

- X. Cold Aggregate Feed System consists of five (5) 10' x 14' Portable "in-line" Cold Feed Compartments. Capacity of each compartment 50 tons. Total capacity 250 tons including Transport Type Frame, Bins, 30" gathering conveyor, drive, starters and breakers installed in plant control center.

Five (5) F440 Syntron Feeders (w/standard "C" Controller)

Syntron Controls for individual and master control for four (4) Syntrons.

Breaker and Sequential Contractor for Syntrons mounted in plant control center. 36" x 80' inclined conveyor to dryer includes Pylon 3-ply belt, speed reducer drive, 20 HP, 1800 RPM motor with necessary "A" frame supports and starters and breakers for inclined cold feed conveyor installed in plant control center.

Includes Remote Application of the Syntron Feeder Control Cabinet within 50' of the centerline of the tower with portable power cable and quick disconnects from the electrical control center to the remote location.

\$40,995.00


Exhibit D, Annexed to Affidavit of James B. M. McNally

*Your acknowledgement agrees with our above order Paragraph 1 thru 7.

In Paragraphs 8 and 9, we believe that your scheduled shipment and time in transit is not sufficient for this carefully planned arrival. Rail shipments to the New York area have been very disappointing lately. We require Your Traffic Dept. to properly gauge this shipment to arrive as per Mr. Lizza's instructions.

Paragraph 9—Because of possible extended time in transit, plus the initial erection time, we believe, under your conditions, that N.Y.S. approval will be impossible to receive in 60 days.

**Exhibit D, Annexed to Affidavit of James B. M.
McNally—Purchase Order.**

(See opposite page.) 

HODGE & HAMMOND, INC.
CONSTRUCTION EQUIPMENT
720 GARRISON AVENUE
NEW YORK, N.Y. 10474
PHONE KILPATRICK 2-2200

Exhibit D

TO: Baldwin-Lima-Hamilton
Lima, Ohio 45022

ORDER NO. S 5558
DATE FEB. 17, 1961

SHIP TO:

Nelson Ready Mix
Kingston, New York

VIA:

ITEM NO.	QUANTITY	NAME AND DESCRIPTION	PRICE	REQU. DELIV. DATE
	One(1)	New Baldwin-Lima-Hamilton 6,000 Lb. Asphalt Plant Tower, LESS Hot Elevator, 60x16-2 1/2 Screen-65 ton Bin Extern. Heated Asphalt Bucket, 4 Hi, 4 Lo Bin Indicators, 96x30 Dryer-S/W715, FP103 Oil Burner, Fuel Oil Pump, (Gencontrol, Mounted in Customers House Under Gooseneck), Asphalt Circulating Pump, Air Compressor, Flex-Kleen Bag Collector, Includes: #24-UDT-576 Bag House, Dust Gathering and Transfer Screws, Support Legs and Walkways, 25 HP Air Compressor, Air Dryer for Compressor, Dust Piping, #1000 Exhauster, 150 HP Motor, Drive Stack, Air Piping from compressor, Electrical Control Center-Basic-to be mounted in customers house under gooseneck. Plus Controls For: Inclined Conveyor, Asphalt Pump, Air Compressor (Plant) Burner Blower, Air Compressor (Bag Filter) Fuel Oil Pump, Hot Oil Heater, (Customers) Dust Screws (Bag Filter), Four (4) Syntrons, Gathering Conveyor Trench Type Cable For: Exhauster and Dryer, Inclined Conveyor, Burner Blower, Fuel Oil Pump, Asphalt Pump, Air Compressor (Plant), Air Compressor (Bag Filter) Hot Oil Heater, Dust Screws (Bag Filter), Four Syntrons, Gathering Conveyor, Miscel Automatic Batcher, (One row presets to be mt'd cust's house under gooseneck), Card Reader, Over-Under Check Weight, Hi-Lo Level Lights, Load Counter, Ticket Printer (PCR) With Tare Price.....	221,039.10	
	S 5558			

LIMA DIVISION
BALDWIN-LIMA-HAMILTON CORPORATION

LIMA, OHIO 45802

AREA CODE 419 224-0421

A SUBSIDIARY OF ARMOUR AND CO.

RECEIVED
1971 FEB 17 AM 8:58
HODGE & HAMMOND, INC.

February 15, 1971

Hodge & Hammond, Inc.
720 Garrison Avenue
New York, New York 10474

Subject: 6,000# Asphalt Plant S/N 624
Sales Order No. 56478-71
For: Nelson Ready Mix

Gentlemen: ---

Your subject order has been accepted and entered as shown on the enclosed acknowledgement copy, describing and pricing the equipment to be furnished. Terms of payment, destination, shipping date and shipping instructions are also shown. We appreciate your order and are proceeding at once with its manufacture. In order to avoid any misunderstanding or confusion, however, we ask that you carefully read your acknowledgement as well as the following points of clarification and let us have your acceptance by signing and returning the duplicate copy of this letter immediately:

1. BLH is to furnish only those items and equipment specified on the enclosed acknowledgement.
2. If this is a different model plant from any that you, as a distributor, have installed, we would furnish a service engineer to supervise the complete erection with the following stipulations.

All foundations must be in.

All material furnished by BLH must be at the job site.

All material such as piping, wiring, pumps, tanks, electrical supply, fuel supply, etc. that is to be furnished by the customer must be readily available and a crew of approximately six men, plus an electrician and adequate equipment to complete installation. This will enable plant to be erected in a reasonable length of time barring weather conditions or other unforeseen problems which might arise.

If for any reason the man works a week or ten days and any material shortage, beyond the control of BLH, exists which hampers the erection, the service representative will instruct the distributor's personnel on further erection procedures and will leave the job site. He will then return at the time that the material difficulties are overcome.

The erection of an asphalt plant that has not had proper coordination of materials prior to the start of the erection can go into six or eight weeks time and this is something that we must discourage.

3. BLH assumes no responsibility for negotiations between you and the customer, or others, for work or materials pertaining to the erection, installation and acceptance of the plant and components.
4. BLH will furnish foundation and layout drawings (plan-view and elevation) of the plant. The design and installation of foundations to suit local topography and building codes is the responsibility of others. BLH assumes no responsibility for equipment furnished by others, not furnished by BLH, that may be shown on the layout drawings. Schematic wiring and piping drawings will be provided for equipment furnished by BLH. Plant elevation drawings show driveway clearance under the mixer, foundation height, length of tower legs and relation of plant and components to datum. Any change from the dimensions shown will be at an additional price.
5. Compliance with State, Local or Municipal Specifications, building codes, air pollution, noise or dust abatement codes is not guaranteed unless it is so indicated on the face of this order.
6. When a bonafide order has been placed for a BLH-Madsen Asphalt Plant and entered into our production schedule, should this order be cancelled there will be a cancellation charge made of 3% of the total list price.

Your prompt response, indicating your acceptance of the order as entered, along with the above points, will avoid delay in placing your order in our production schedule.

We also request that you forward your confirming purchase order indicating complete shipping instructions at your earliest convenience.

Very truly yours,

BALDWIN-LIMA-HAMILTON CORPORATION
LIMA DIVISION

Ray Hahn

Ray Hahn
Sales Order Department Supervisor

RH:ka

cc: Mr. A. D. Bellows
Service Department
Mr. R. E. Lynn

ACCEPTED:

HODGE & HAMMOND, INC.

DISTRIBUTOR

BY

NAME

TITLE

DATE:

2-19-71



53a

**Exhibit E, Annexed to Affidavit of James B. M. McNally
—Answer.**

SUPREME COURT,

NASSAU COUNTY.

LIZZA INDUSTRIES, Inc. and MIDHAMPTON ASPHALT CORP.,
Plaintiffs,

against

**HODGE & HAMMOND, Inc. and BALDWIN-LIMA-HAMILTON
CORPORATION,**
Defendants.

Hodge & Hammond, Inc., one of the defendants, by Paul V. Rudden, Esq., Leland Stuart Beck of counsel, its attorney answering the complaint of the plaintiffs respectfully allege:

1. This defendant denies knowledge or information sufficient to form a belief as to those allegations contained in paragraphs designated "First" and "Second" of the plaintiff's complaint.

2. This defendant denies the allegations contained in paragraphs designated "Seventh" and "Eighth" of plaintiff's complaint except admits that the plaintiff Lizza Industries, Inc. entered into an agreement on July 30, 1970 with the defendant Hodge & Hammond, Inc., acting as an agent for a disclosed principal Baldwin-Lima-Hamilton Corporation and refers said agreement to this Honorable court for the legal significance thereof.

3. This defendant denies the allegations designated in paragraphs "Ninth", "Tenth", "Eleventh", "Thirteenth", "Fourteenth" and "Fifteenth" of plaintiff's complaint.

DISTRIBUTOR'S AGREEMENT

BALDWIN-LIMA-HAMILTON CORPORATION

Lima Division

LIMA, OHIO

Exhibit A

THIS AGREEMENT, made and entered this 15th day of March, 1969, by and between BALDWIN-LIMA-HAMILTON CORPORATION, Lima Division, a Delaware corporation, with General Offices at Lima, Ohio, (hereinafter referred to as the "Company"), and HODGE & HAMMOND, INC.

a. New York ~~incorporation~~ corporation with its principal place of business at
(state) ~~individual~~
720 Garrison Avenue New York
(address) (city)
New York, (hereinafter referred to as the "Distributor");
(state)

WITNESSETH:

For and in consideration of the mutual promises and covenants herein set forth, the parties hereto agree as follows:

1. **RIGHT TO PURCHASE:** The Company grants to Distributor the right to purchase for resale from the Company BLH Lima Austin-Western Crushing Equipment
BLH Lima Madsen Asphalt Equipment
BLH Lima Paver
BLH Lima Hot-Foot

including all attachments thereto (hereinafter referred to as "Machines") and BLH genuine Repair Parts related thereto (Machines and Repair Parts are hereinafter referred to collectively as "Products") according to Distributor's Discount and Payment Schedule, attached to this Agreement, marked Exhibit A, and incorporated herein by reference. It is understood that the Company also has the right to make direct sales and rentals of Products to the United States Government, any State Highway Department or turnpike authority, its affiliated companies, railroad companies, assemblers who use the Products in manufacturing their equipment, the offshore drilling industry, the scrap iron and steel industry and for export sales.

2. **TERRITORY:** The Territory designated below shall be the area of Distributor's primary sales, rental and service responsibility:

FOR CRUSHING EQUIPMENT

State of New York: All counties in New York State South of and including -
Sullivan, Ulster and Dutchess
Also includes Fishers Island, Suffolk County.

FOR ASPHALT EQUIPMENT (INCLUDES PAVER & HOT-FOOT)

State of New York: All counties in New York State South of and including -
Sullivan, Ulster and Dutchess, except Staten Island.
Also includes Fishers Island Suffolk County.

(hereinafter referred to as "Territory").

and rent Machines and BLH genuine Repair Parts and to promote and fully develop the potential for the sale and rental of Machines and Repair Parts within the Territory. To fulfill these responsibilities, Distributor shall establish and maintain within the Territory a suitable place of business and complete service facility for the satisfactory display, care, and repair of Products. Distributor shall also employ as many experienced salesmen and mechanics as are necessary to sell and rent the Products and to render prompt and efficient service at reasonable prices to any owners or lessees of the Products. Distributor shall comply with the Company's policies and requirements relating to advertising, selling, and servicing of the Products and all terms of this Agreement as hereinafter provided. Distributor shall, in all his activities, protect the good name of the Company and its Products.

4. **INVENTORY:** Distributor shall maintain and display within the Territory at all times a representative stock of new Machines based upon the potential sales volume in the Territory, the number of models to be determined by mutual agreement. In addition, Distributor shall maintain adequate stocks of the most commonly used BLH genuine Repair Parts in keeping with the needs of the Company's users in the Territory.

5. **INVENTORY RETURN:** Distributor shall deliver to the Company when requested a full report as to the Products in stock and allow the Company to inspect such stock at any reasonable time during the working day. If such report discloses any obsolete, non-current, or slow-moving Repair Parts, the Company may direct that such Repair Parts (if new, unused, and suitable for resale as new) be returned to it, F.O.B. Lima, Ohio and if so returned, the price of such Repair Parts shall be credited to Distributor at the Company's then current suggested retail prices for such Repair Parts, less Distributor's discount and the Company's restocking fee. If distributor does not follow Company's instructions, he forfeits any right to later claim credit for such Repair Parts.

6. **INSPECTION, INSTRUCTION, AND INSTALLATION SERVICE:** Distributor, at his expense, shall (a) fully inspect and test all Machines sold or rented by him, (b) render installation service on such Machines, and (c) instruct the user in the proper operation, use, and maintenance of such Machines, so as to insure complete customer satisfaction. Distributor shall complete the Certificate of Delivery and shall require each of his customers to sign such Certificate in triplicate, one copy shall be given to the customer, one copy mailed to the Company, and the third copy retained by Distributor for his records.

7. **WARRANTY:** Distributor shall sell or rent the Company's Products only according to Company's Standard Warranty which is set forth as follows:

Baldwin-Lima-Hamilton Corporation, Lima Division (called "BLH") warrants its products to be free from defects in material and workmanship for a period of six (6) months from the date of delivery of the product to the original purchaser-user. The obligation of BLH under this warranty is limited to repairing or replacing, at BLH's option, any part of the product which in BLH's opinion is defective in the material or workmanship. All costs of shipping the product to or from BLH's factory shall be for purchaser's account. No claim under this warranty shall be allowed by BLH unless such claim is submitted in writing to BLH within 30 days of the date of the discovery of the defect.

This warranty shall not apply to product which has been modified by BLH at the request of purchaser or which has been operated in any manner other than recommended by BLH or which has been unused or neglected or damaged through an accident or which has been repaired, altered, or modified or used in any manner which in BLH's opinion adversely affects its performance.

THIS WARRANTY AND BLH'S OBLIGATION HEREUNDER IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE and all other obligations, or liabilities including liability for direct, indirect or consequential damages with respect to the sale or use of the product.

No person is authorized to change or otherwise modify this warranty or assume any other liability on behalf of BLH unless such change, modification, or assumption is made in writing and signed by an officer of BLH. ANY ITEM OF THE PRODUCT NOT MANUFACTURED BY BLH SHALL NOT BE COVERED BY THIS WARRANTY OR THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OR ANY OTHER WARRANTY FROM BLH, such items being subject to the warranties of their respective manufacturers.

Distributor shall extend the same warranty to his customers but shall not in any manner enlarge or modify or otherwise alter the terms of such warranty without the express written consent of an officer of the Company.

sold or rented by him. Distributor shall not alter any Products or any way infringe or lessen the validity of any patents or trademarks under which the Company's Products are manufactured or sold.

8. **SERVICE:** Distributor shall render service to users of Products within the Territory at a reasonable cost to the user and in a manner consistent with accepted industry standards and practices and the policies of the Company. If Distributor requests the Company to furnish a serviceman for the purpose of assisting Distributor in rendering such service, or any warranty service or start up service, Distributor shall pay the Company for such service at the Company's then current per-diem rate for servicemen, plus the Company's expense in transporting and maintaining such servicemen, except that the Company will provide such service without charge on the first model sold or rented by Distributor of any Machine listed in Section 1 above.

9. **PRICES:** The Prices for the Products to Distributor shall be the current suggested retail prices established by the Company and in effect at the time of acceptance of Distributor's order for the Products by the Company, less the Distributor's discount as set forth in Exhibit A. All prices are F.O.B. Lima, Ohio, transportation at Distributor's expense. To Distributor's prices shall be added any federal, state, or municipal taxes, charges or assessments which may be levied upon or collected from the Company as a result of the sale of the Products to Distributor.

10. **ACCEPTANCE:** All orders for Products shall be subject to acceptance by the Company at its Lima, Ohio office. The Company may refuse to accept any order for any reason whatsoever. After acceptance by the Company, no order may be cancelled by Distributor without the written consent of the Company and payment of all damages resulting from such cancellation.

11. **FORCE MAJEURE:** The Company shall not be liable in any respect for failure or delay in the shipment of Products if hindered or prevented, directly or indirectly, by war, national emergency, inadequate transportation facilities, inability to secure materials, supplies, fuel, or power, fire, flood, windstorms or other acts of God, strikes, lockouts, or other labor disputes, orders or acts of any government or governmental agency or authority, whether valid or invalid, or any other cause of like or different kind beyond the reasonable control of the Company. Strikes, lockouts, or other labor disputes involving employees of the Company shall be deemed beyond the reasonable control of the Company. The Company may, during any period of shortage due to any of the above causes, allocate its available supply of Products among itself and its Distributors on whatever basis it deems desirable.

12. **DELAY IN SHIPMENT:** All shipping dates set by the Company and Distributor for delivery of the Products are based on the Company's best estimates. Except as excused under the Force Majeure provision in Section 11 above, the Company will endeavor so far as practical to meet such shipping dates but will not be liable to Distributor for any damage or loss due to delays in the delivery of the Products.

13. **SHIPMENT AND TITLE:** The Company's responsibility for the Products ceases upon delivery to the transportation company or other agency on behalf of Distributor, and all claims for damages or loss during transit must be made by Distributor directly against such transportation company or other agency. Any claims against the Company for shortages in shipment shall be made within thirty (30) days after receipt of shipment by Distributor. Except where title is retained by the Company for security purposes, title to the Products shall pass from the Company to Distributor upon delivery by the Company of the Products to Distributor's carrier.

14. **SECURITY:** Under certain plans for payment, the parties may enter into a security agreement whereby the Company retains a security interest in the Products and other assets of Distributor. In such situations, Distributor shall cooperate fully with the Company in preserving the Company's security interest, and in this regard shall sign all necessary documents and shall allow the Company or its designated representative the right to inspect the Products and rental agreements covering all Products for which the Company has not received payment in full.

15. **INSURANCE:** On all Machines in which the Company has a security interest or equity or holds unsatisfied any sort of title retention contract, Distributor shall maintain All Risk Contractor's Equipment Insurance and Comprehensive General Liability Insurance (including Products - Completed Operations Insurance); the insurance policies shall name Distributor and the Company and the insurance shall cover the respective interests of both. All insurance policies shall be in amounts and with a carrier satisfactory to the Company and shall contain a clause which provides that the Company will be notified at least ten (10) days prior to termination of such policy. Distributor shall mail copies of insurance certificates noting the above coverage to the Company.

16. **CHANGES:** The Company reserves the right at any time to change the suggested retail prices, discounts, plans for payment, terms, and warranties of the Products. When notice of any such change is mailed to Distributor, all previous suggested retail prices, discounts, plans for payments, terms and warranties shall automatically be suspended. In addition, the Company reserves the right at any time to change or modify the construction of Products or to discontinue any Products entirely. The Company shall have no obligation to make such changes or modifications on Products previously ordered or shipped.

17. **ADVERTISING AND SALES LITERATURE:** The Company shall advertise and promote the Products in such manner and to such extent as in its judgment it deems desirable. In addition, the Company shall supply Distributor F.O.B. Lima, Ohio, such catalogues, circulars, cuts, and other advertising material as in its judgment are necessary. Distributor shall advertise and promote the Products so as to fully develop a customer interest in the Products within his Territory.

The Company will furnish to Distributor F.O.B. Lima, Ohio, suggested retail price lists, sales manuals, Repair Parts lists, service manuals, stock record books, and other printed material needed by Distributor, but such materials shall remain the property of the Company and shall be returned to the Company at the Company's request.

18. **COMPANY'S NAME:** Distributor shall not use as part of his name the words "Armour", "Baldwin-Lima-Hamilton", "BLH", "Lima", "Austin-Western", or "Madsen" or any variations of such names, or any other trade names or trade styles used by the Company, and shall not, upon termination of this Agreement, use any name so nearly like that of any of the above names as would likely lead third parties to confusion or uncertainty.

19. **REPORTS:** Distributor shall report to the Company on the tenth (10th) day of each calendar month, the name and address of every purchaser or lessee during the preceding month, of a Machine purchased according to a floor plan or a Machine in which the Company has or had a security interest, specifying the date and place of delivery together with the terms under which the Machine was sold or rented. In addition, Distributor shall keep Company fully advised at all times as to his financial condition and supply to the Company, at least once a year, an audited balance sheet and a profit and loss statement.

20. **INDEPENDENT CONTRACTOR:** Distributor shall at all times act as independent contractor and shall not transact any business in the name of the Company, or obligate the Company in any manner, character, or description. This Agreement shall not be construed as constituting Distributor as an employee or agent of the Company for any purposes whatsoever, and the Agreement does not vest Distributor with the power or authority to make adjustments with customers on behalf of the Company or otherwise bind or obligate the Company in any respect whatsoever.

21. **DISPUTES:** If any disputes or disagreements arise between Distributor and other Company distributors in connection with the sale of Products, the Company shall have the right to settle such disputes and the decision by an officer of the Company shall be final and binding upon the parties thereto.

22. **TERMINATION:** This agreement shall remain in full force and effect until terminated by either party giving the other party written notice by registered mail to that effect. After the termination, the sale of any of the Company's Products by Distributor or the referring of prospective purchasers by the Company to Distributor shall not be construed as a renewal of this Agreement. If a petition in bankruptcy is filed by or against Distributor or if Distributor takes any action under any provision of law for the purpose of relieving himself in any manner of his debts, or if he makes an assignment for the benefit of the creditors, or if a receiver is appointed to take possession of his property, the Distributor shall be deemed to have given written notice of his termination of this Agreement.

23. **EFFECT OF TERMINATION:** If this Agreement is terminated by either party or by mutual agreement, such termination shall not operate as a cancellation of orders for Products received and accepted by the Company from Distributor and not delivered prior to the effective date of termination. Termination of this Agreement shall in no event operate as a cancellation of any debts between the parties.

24. **REPURCHASE OF PRODUCTS:** Should the Company notify Distributor of termination by written notice, the Company shall purchase from Distributor and Distributor shall sell to the Company F.O.B. Lima, Ohio, all new, unused, current, and saleable Machines at prices originally charged to Distributor and all new, unused, current, and saleable Repair Parts at the Company's current suggested retail prices less Distributor's discount and Company's restocking fee which are owned by Distributor and were previously purchased from the Company by Distributor.

Should Distributor notify the Company of termination by written notice or should the parties mutually agree to terminate this Agreement, the Company, at its option and upon written notice by it to such effect, may purchase from Distributor and Distributor shall, in such event, sell to the Company all new, unused, current, and saleable Machines or Repair Parts owned by Distributor and previously purchased from the Company by Distributor at the same price basis as stated in the first paragraph of this Section 24.

25. **ENTIRE AGREEMENT:** No prior agreements or understandings, whether oral or written, shall in any manner alter, enlarge, change, or modify any of the terms of this Agreement, except that this Agreement shall not operate as a cancellation of any debts between the parties resulting from any previous agreements. No waiver by either party of any of the terms or conditions of this Agreement or of a breach of any of the provisions hereof shall be deemed to be a waiver of any such terms or conditions or any succeeding breach. This Agreement cannot be altered or enlarged except in writing signed by Distributor and by an officer of the Company except as to changes or additions to the suggested retail prices, discounts, plans, for payments, terms, and warranties which may be changed at any time by the Company.

26. **APPLICABLE LAWS:** This Agreement shall be governed by and interpreted according to the laws of the State of Ohio.

27. **ASSIGNMENTS:** This Agreement may be assigned to and shall be binding upon and inure to the benefit of any affiliate, or any successor to substantially all the assets and business of either party, but except as provided herein, this Agreement shall not be assigned by either party in whole or in part without the prior written consent of the other party.

28. **NOTICES:** All notices to be given under this Agreement shall be given in writing and delivery thereof shall be made either in person or by mail. Notices shall be addressed to the parties at their places of business designated at the beginning of this Agreement. Notices properly addressed and deposited in the United States mail in sealed envelopes, postage prepaid, shall be deemed given as of date of mailing.

29. **CAPTIONS:** Various captions used in this Agreement as headings for paragraphs or otherwise are for convenience only and shall not be used in interpreting or limiting text of the paragraph in which they appear.

30. **EFFECTIVE DATE:** This Agreement is not valid until approved in writing by an officer of the Company and when so approved shall be effective from the date of such approval.

IN WITNESS WHEREOF, the parties have signed this Agreement the day and year first above written:

.....	HODGE & HAMMOND, INC.	Partnership
.....	Distributor's Name	Corporation
.....	Signature	Individual
By:	<i>[Signature]</i>	
Title:	<i>[Signature]</i>	
BALDWIN-LIMA-HAMILTON CORPORATION		
Lima Division		
By:	<i>[Signature]</i>	
	Sales Manager	

Approved by Baldwin-Lima-Hamilton Corporation at its Lima, Ohio office this 15th day of March, 1969.

By:

[Signature]

Vice President

EXHIBIT A

BALDWIN-LIMA-HAMILTON CORPORATION

Lima Division

Lima, Ohio

DISTRIBUTOR'S DISCOUNT AND PAYMENT SCHEDULE

DISCOUNT SCHEDULE

Under the terms of the Distributor's Agreement, of which this Exhibit A is to be attached and made a part thereof, Distributor has the right to purchase for resale F.O.B. Lima, Ohio, the Machines noted below, along with related Repair Parts, at discounts from the Company's suggested retail prices as follows:

BLH AUSTIN-WESTERN CRUSHING, SCREENING AND WASHING EQUIPMENT

MACHINES AND EXTRAS	Distributor's Discount
Austin-Western Crushing, Screening and Washing Equipment of our Manufacture (Except extras as listed below)	20%
SECO SCREENS	15%
EAGLE WASHING EQUIPMENT (Sold only as part of Austin-Western Equipment)	10%
POWER UNITS:	
Buda	10%
Caterpillar	10%
International Harvester	10%
Murphy	10%
Wisconsin	10%
Electric Motors, Controls, etc.	10%
Other (Price and Discount on Application)	

*If attachments are ordered within six (6) months of the date of shipment of the Machine, the regular Machine Distributor's discount shall be applied to the suggested retail prices. After the six (6) month period, fifteen per cent (15%) shall be added to the suggested retail prices of the attachments before application of the Distributor's discount.

EXHIBIT A

BALDWIN-LIMA-HAMILTON CORPORATION

Lima Division

Lima, Ohio

DISTRIBUTOR'S DISCOUNT AND PAYMENT SCHEDULE

DISCOUNT SCHEDULE

Under the terms of the Distributor's Agreement, of which this Exhibit A is to be attached and made a part thereof, Distributor has the right to purchase for resale F.O.B. Lima, Ohio, the Machines noted below, along with related Repair Parts, at discounts from the Company's suggested retail prices as follows:

BLH-MADSEN ASPHALT PLANTS

	Distributor's Discount
Towers, Tower Unit Attachments and Tower Unit Optional Equipment	15%
Dryers and Dryers Optional Equipment	15%
Burners and Burners Optional Equipment	15%
Dust Collectors and Dust Collectors Optional Equipment	15%
Asphalt Circulating Pumps	15%
Air Compressors	10%
Hot Oil Heaters and Hot Oil Heaters Optional Equipment	10%
Mineral Fillers and Mineral Fillers Optional Equipment	15%
Wet Tube Washers and Wet Tube Washers Optional Equipment	15%
Water Pump	15%
Plant Electrical Control Center and Any Additional Starters and Breakers To Be Added To Plant Control Centers	10%
Interconnecting Cables between Plant Control Center and Outlying Motors (Trench Type and Portable Type)	15%
Automatic Batch Controls	10%
House Trailers, Installation of Equipment in House Trailers, and Remote Application of Equipment	15%
Transport Equipment	15%
Cold Feed Compartments	15%
Syntro Feeders and Syntro Controls	15%
Reeves Vari-Speed Drives	15%

*If attachments are ordered within six (6) months of the date of shipment of the Machine, the regular Machine Distributor's discount shall be applied to the suggested retail prices. After the six (6) month period, fifteen per cent (15%) shall be added to the suggested retail prices of the attachments before application of the Distributor's discount.

EXHIBIT A

BALDWIN-LIMA-HAMILTON CORPORATION

Lima Division

Lima, Ohio.

DISTRIBUTOR'S DISCOUNT AND PAYMENT SCHEDULE

DISCOUNT SCHEDULE

Under the terms of the Distributor's Agreement, of which this Exhibit A is to be attached and made a part thereof, Distributor has the right to purchase for resale F.O.B. Lima, Ohio, the Machines noted below, along with related Repair Parts, at discounts from the Company's suggested retail prices as follows:

BLH PAVERS AND "HOT-FOOT" ASPHALT FINISHER

	Distributor's Discount
BLH Paver and Attachments	20%
BLH "Hot-Foot" Asphalt Finisher	35%

*If attachments are ordered within six (6) months of the date of shipment of the Machine, the regular Machine Distributor's discount shall be applied to the suggested retail prices. After the six (6) month period, fifteen per cent (15%) shall be added to the suggested retail prices of the attachments before application of the Distributor's discount.

Repair Parts

Distributor's Discount

All Repair Parts

25%

All orders to the Company directly from Distributor's customer and invoiced by the Company

15%

Note: The Company will only accept orders in excess of Twenty Dollars (\$20.00). If Distributor requests that any Repair Part be shipped from Company's Warehouse, Distributor shall pay to the Company an additional warehouse premium of ten per cent (10%) of the suggested retail price for the Repair Part.

Unlisted Repair Parts and Attachments

Prices not shown on the Company's suggested retail price list shall be established by the Company at the time the order for the Repair Parts or Attachments is received by the Company.

Company Restocking Fee

The Company restocking fee as the term is used in the Distributor's Agreement shall be ten per cent (10%) of Distributor's net price (suggested list price less Distributor's discount) for the Repair Parts. If the Repair Parts were purchased by Distributor utilizing the three per cent (3%) cash discount, the cash discount will be deducted from Distributor's net price before deduction of the ten per cent (10%) restocking fee.

PAYMENT SCHEDULE:

1. For all machines and Repair Parts, Distributor shall pay Company's invoiced price in cash on or before the tenth (10th) day of the month following date of invoice. If so paid, without other deduction, Company will allow Distributor a discount of three per cent (3%) from Distributor's net price. Machines may also be purchased on Company's current floor plan or upon mutually agreed terms. Such requests shall be placed through the Sales Department of the Company for consideration.

2. All past due items will be subject to seven and one-half per cent (7½%) annual simple interest, and will appear on Distributor's statement and be due and payable (net) as it accrues. If it is necessary to limit Distributor to C.O.D. terms because of overdue payments, Distributor shall be invoiced and pay for all new orders of Products at the Company's suggested retail prices, with the Company crediting an amount equal to Distributor's discounts for such Products to Distributor's overdue accounts.

NOTE:

The Company reserves the right to change its suggested retail prices, discounts, plans for payment, terms, and warranties at any time.

EFFECTIVE DATE:

March 15, 1969

BALDWIN-LIMA-HAMILTON CORPORATION

By:


Sales Manager

AMENDMENT

THIS AMENDMENT, made this 1st day of August,
1970, by and between BALDWIN-LIMA-HAMILTON CORPORATION, LIMA DIVISION,
a Delaware corporation, with general offices at Lima, Ohio,
(hereinafter referred to as the "Company"),

and HODGE & HAMMOND, INC.,
a New York ~~partnership~~
(state) ~~corporation~~
~~individual~~

with its principal place of business at 720 Garrison Avenue
(address)

New York New York
(city) (state)

(hereinafter referred to as the "Distributor");

W I T N E S S E T H:

WHEREAS, the Company and the distributor entered into a Distributor's
Agreement on March 15, 1969, 19 , for the sale and distribution
of certain of the Company's products;

NOW, THEREFORE, for and in consideration of the mutual promises
and covenants herein set forth, the parties hereto agree as follows:

1. Paragraph 7 of the Distributor's Agreement is deleted and the
following paragraph is substituted in its place:

WARRANTY: Distributor shall sell or rent the Company's Products
only according to Company's Standard Warranty which is set forth

as follows:

Baldwin-Lima-Hamilton Corporation, Lima Division, (called "BLH") warrants its products to be merchantable and free from defects in material and workmanship for a period of six (6) months from the date of delivery of the product to the original purchaser-user. The obligation of BLH under this Warranty is limited to repairing or replacing, at BLH's option, any part of the product which in BLH's opinion is unmerchantable or defective in material or workmanship. All costs of shipping the product to or from BLH's factory shall be for purchaser's account. No claim under this Warranty will be allowed by BLH unless such claim is submitted in writing to BLH within thirty (30) days of the date of discovery of the defect.

This Warranty shall not apply to product which has been modified by BLH at the request of purchaser or which has been operated in a manner other than recommended by BLH or which has been misused or neglected or damaged through an accident or which has been repaired, altered or modified or used in any manner which in BLH's opinion adversely affects its performance.

THE ABOVE WARRANTY IS IN LIEU OF ALL OTHER OBLIGATIONS AND WARRANTIES BY BLH, WHETHER EXPRESS OR IMPLIED. BLH MAKES NO IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE OR MERCHANTABILITY WHICH EXCEED THE AFORESAID WARRANTY. In addition, BLH shall not be obligated or liable for direct, indirect or consequential damages with respect to the sale or use of the product.

No person is authorized to change or otherwise modify this Warranty or assume any other liability on behalf of BLH unless such change, modification or assumption is made in writing and signed by an officer of BLH. ANY ITEM OF THE PRODUCT NOT MANUFACTURED BY BLH SHALL NOT BE COVERED BY THIS WARRANTY OR THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OR ANY OTHER WARRANTY FROM BLH, such items being subject to the warranties of their respective manufacturers.

Exhibit E, Annexed to Affidavit of James B. M. McNally

4. This defendant denies the allegations contained in Paragraph "Twelfth" of the plaintiff's complaint except admits the receipt to \$366,000 against an invoice of \$456,484.85 leaving a balance due defendant of \$90,484.85.

AS AND FOR COMPLETE DEFENSE AND CROSS-CLAIM

5. That on or about July 30, 1970 the plaintiff Lizza Industries, Inc. entered into an agreement with the defendant Hodge & Hammond, Inc. a copy of which is annexed to the plaintiff's complaint.

6. That in connection with the negotiation and execution of the aforesaid agreement the defendant Hodge & Hammond Inc. was acting as an exclusive agent for the defendants Baldwin-Lima-Hamilton Corporation.

7. That between August 5, 1970 and August 12, 1970 the defendants Hodge & Hammond Inc. forwarded the plaintiff's order to the defendants Baldwin-Lima-Hamilton Corporation which order was accepted by the defendants Baldwin-Lima-Hamilton Corporation.

8. That thereafter the defendants Baldwin-Lima-Hamilton Corporation delivered to the plaintiff the asphalt plant ordered by the plaintiff.

9. That the complaint of the plaintiff alleges that the plant delivered by the defendants Baldwin-Lima-Hamilton Corporation was defective, and not in accordance with the agreement and purchase orders entered into by the plaintiff.

10. That if the allegations of the plaintiff's complaint are upheld to any degree and any judgment shall be entered in favor of the plaintiffs by reason thereof, the damages sustained by the plaintiffs, if any, shall be the fault, liability, and responsibility of the defendant Baldwin-Lima-Hamilton Corporation and not of the defendant Hodge & Hammond, Inc.

Exhibit E, Annexed to Affidavit of James B. McNally

11. That if the defendant Hodge & Hammond, Inc. shall be adjudged liable to the plaintiffs by reason of the allegations contained in plaintiff's complaint then and in that event the defendant Hodge & Hammond, Inc. shall be entitled to judgment over against Baldwin-Lima-Hamilton Corporation for the amount of such liability together with the costs and disbursements incurred in defending this action.

AS AND FOR A COUNTER-CLAIM AND CROSS-CLAIM AGAINST
THE PLAINTIFFS

12. Defendant Hodge & Hammond, Inc. repeats and re-alleges each and every allegation contained in paragraphs 1 through 11 of this answer the same force and legal effect as though fully set forth at length herein.

13. The defendant Hodge & Hammond, Inc. is a domestic corporation duly licensed to do business in the State of New York and maintaining an office for the conduct of its business in the city of New York.

14. That the defendant Baldwin-Lima-Hamilton Corporation is a foreign corporation authorized to do business in the state of New York and maintaining its principal office at Lima, Ohio.

15. That the plaintiff Lizza Industries, Inc. is a domestic corporation maintaining its principal place of business in the county of Nassau.

16. That on July 30, 1970 the plaintiff Lizza Industries, Inc. entered into an agreement with the defendant Hodge & Hammond, Inc. acting as an agent for a disclosed principal Baldwin-Lima-Hamilton Corporation for the purchase of an asphalt plant. A copy of this agreement is annexed to the complaint and the court is referred thereto for the full terms thereof.

Exhibit E, Annexed to Affidavit of James B. M. McNally

17. That thereafter and between August 5 and August 12, 1970 plaintiffs order for the said asphalt plant was forwarded by the defendant Hodge & Hammond, Inc. to Baldwin-Lima-Hamilton Corporation which order was accepted by Baldwin-Lima-Hamilton Corporation on August 12, 1970. A copy of the order and the acceptance are annexed hereto and the court is referred to the agreement for the full terms thereof.

18. That on or before April 15, 1971 the asphalt plant was delivered by Baldwin-Lima-Hamilton Corporation to the plaintiff.

19. That pursuant to the agreement entered by the plaintiff Lizza Industries, Inc., plaintiff is indebted to the defendant Hodge & Hammond, Inc. in the total sum of \$456,484.85 plus New York State tax.

20. That no portion of the said amount has been paid except the sum of \$366,000.

21. That by reason thereof the plaintiff Lizza Industries Inc. is indebted to the defendant Hodge & Hammond in the sum of \$90,484.85.

22. That if the allegations of plaintiff's complaint are upheld and plaintiff fails to make payment of the balance due this defendant by reason thereof the defendant Baldwin-Lima-Hamilton Corporation shall be indebted to the plaintiff in the sum of \$90,484.85.

AS AND FOR AN ADDITIONAL COUNTER-CLAIM AGAINST THE PLAINTIFFS

23. The defendant Hodge & Hammond Inc. repeats and realleges that on January 28, 1971 plaintiff Lizza Industries, Inc. entered into an agreement with Hodge & Hammond, Inc. acting as an agent for disclosed principal Baldwin-Lima-Hamilton Corporation for the pur-

Exhibit E, Annexed to Affidavit of James B. M. McNally

chase of a BLH 6000 lb. Madsen Asphalt Plant at a purchase price of \$296,408. A copy of that agreement is annexed hereto and made a part hereof.

24. That thereafter certain modifications to the purchase order were entered into between the plaintiff Lizza Industries, Inc. and the defendant Hodge & Hammond, Inc. under which plaintiff's order for a dust collector for the asphalt plant was cancelled.

25. That on or about May 19, 1971 the said asphalt plant was delivered to the plaintiff and accepted by the plaintiff.

26. That pursuant to the agreements entered into between the plaintiff and the defendant Hodge & Hammond, Inc. the plaintiff Lizza Industries, Inc. is indebted to the defendant Hodge & Hammond, Inc. in the sum of \$236,698.50.

27. That no part of said sum has been paid except the sum of \$8,000 leaving a balance due defendant Hodge & Hammond, Inc. in the sum of \$228,698.50 together with interests, costs, and disbursements of this action.

WHEREFORE defendant Hodge & Hammond, Inc. demands:

A. That the complaint of the plaintiffs be dismissed.

B. That defendant Hodge & Hammond, Inc. have judgment over against the defendant Baldwin-Lima-Hamilton Corporation in the amount of any judgment rendered against it together with costs and legal fees.

C. That defendant Hodge & Hammond, Inc. have judgment against the plaintiffs in the sum of \$90,484.85 on the first counter-claim.

Exhibit E, Annexed to Affidavit of James B. M. McNally

D. Defendant Hodge & Hammond, Inc. have judgment against Lizza Industries, Inc. in the sum of \$228,698.50 together with interests, costs, and disbursements on the second counter-claim.


E. For such other and further relief as in the claims may seem just.

Dated: Mineola, New York
February 21, 1973

Yours, etc.

PAUL V. RUDDEN
by LELAND STUART BECK
Attorney for Defendant
Office and P. O. Address
288 Old Country Road
Mineola, New York

**Exhibit F, Annexed to Affidavit of James B. M. McNally
—Statement of Account.**

(See opposite page.) 

61a

**Affidavit of Leland Stuart Beck in Opposition, Dated
September 12, 1973.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of Nassau, ss:

LELAND STUART BECK, being duly sworn, deposes and says:

1. That he is an attorney associated with Paul V. Rudden, the attorney for the defendant in the above captioned matter and that he makes this affidavit in opposition to the motion of the plaintiff for a summary judgment.

2. This motion should be denied on three bases:

A. The motion is premature. There has been no discovery proceedings conducted in this case although in the companion state case depositions are presently scheduled. In addition, there is presently pending in this Court a motion to dismiss the plaintiff's cause of action. That motion is still pending and has not yet been decided. The issues in this case are presently the subject of a New York State action in the Supreme Court, Nassau County. That action is presently pending and the determination of those issues will be dispositive of all of the issues raised in the instant case.

B. The application for a summary judgment is totally unsupported by either the quality or weight of evidence required. This motion is supported solely by the affidavit of an attorney who does not have personal knowledge of the issues. He bases his motion on an agreement between the parties. However, there is no showing by the plaintiff, nor could there be, that the terms of that agreement govern the relationship between the parties

*Affidavit of Leland Stuart Beck in Opposition, Dated
September 12, 1973*

in connection with the sale of the Asphalt Plants to Lizza Industries, Inc. and Mid-Hampton Asphalt Corporation, the subject of this controversy.

In addition, there is no attempt by the plaintiff to show that the product was free from defect. There is however an admission that the product which was delivered has been the subject of a claim made by the ultimate consumer that the plant was not in accordance with the warranties. Attached to this application is the complaint in the New York State action made by the ultimate consumer which had been omitted from the moving papers.

C. There are issues of fact to be determined. The pleadings in this case raise issues of fact which cannot be determined by a motion without a full hearing of the facts. One of the issues to be determined is the relationship between the parties in connection with the sale of these plants to Lizza Industries, Inc. and Mid-Hampton Asphalt Corp. As can be seen, from the complaint of Lizza, the nature of the transaction was one which led the ultimate consumer to believe that the defendant in this case was acting solely as an agent for the plaintiff. That relationship is alleged in the answer. From the affidavit of Lewis Hammond, Jr., attached hereto, it will be clearly seen that the proof to be presented to this Court will be that the contract for the sale of these plants was dictated directly by the plaintiff from its factory and communicated to the customer through its district representative, Ray Lynn. Hodge & Hammond, Inc., the defendant herein acted solely as the sales agent for the plant in connection with these sales.

In addition, the compliance of the plaintiff with its contract of sale is in issue. The Court is referred to the complaint set forth by the ultimate consumer as alleged in the answer. There is no attempt by the plain-

*Affidavit of Leland Stuart Beck in Opposition, Dated
September 12, 1973*

tiff to indicate that the plants delivered were in accordance with the contract of the plaintiff and there exists a valid and bonafide claim of defect which will be the subject of litigation in the New York State action and this action.

The plaintiff's moving papers claim that the defendant wishes to prevent an early determination of the issues. Nothing could be further from the truth. It is the plaintiff herein who has steadfastly refused to permit the state action to proceed in order that all of the issues might be determined in a convenient forum where all of the parties were present. That State action was commenced by the service of a summons and complaint in June 1972 and the plaintiff herein has been delaying the disposition of that case since that time.

It is important to the defendant that this matter be determined as soon as possible. However, it is necessary for the determination that all of the interested parties be before the same tribunal and it is for that purpose that the original motion was made. That motion was made returnable to this Court on March 12, 1973. At the request of the plaintiff herein it was adjourned time and again until May 31, 1973 when it was finally submitted to the Court. Any delay in disposition of these issues should be clearly recognized as the deliberate delay of the plaintiff herein.

WHEREFORE, in view of the fact that there are issues to be determined at the trial of this action, that the motion is totally unsupported by convincing evidence, and that there is another action pending in this matter, this motion should be denied in its entirety.

(Sworn to by Leland Stuart Beck, September 12, 1973.)

**Affidavit of Lewis Hammond, Jr., in Opposition,
Dated September 12, 1973.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of Nassau, ss:

LEWIS HAMMOND, Jr., being duly sworn deposes and says:

1. That I am the president of the defendant, Hodge & Hammond, Inc. and have personal knowledge of the transactions relating to the sale of two asphalt plants to Lizza Industries, Inc. and Mid-Hampton Asphalt Corporation, the subject of this litigation.

2. Hodge & Hammond, Inc. is a sales organization engaged in the sale, distribution and servicing of heavy machinery and equipment. One of the lines which we carried at the time of these transactions was the line of Baldwin-Lima-Hamilton Corporation.

3. One of our customers, Lizza Industries, Inc. indicated an interest in the purchase of an asphalt plant in the Spring of 1970. Although our company is knowledgeable in the field of heavy machinery, we do not stock, we do not service nor have we any technical experience in connection with asphalt plants. I therefore contacted the district representative of Baldwin-Lima-Hamilton Corporation, Ray Lynn.

4. Mr. Lynn attended every sales meeting which I had with the customer. Mr. Lynn actually negotiated the sale and explained the equipment to the customer. At times when Mr. Lynn's expertise was insufficient to handle the subject, he called the factory from the sales meeting and received answers which he communicated to the customer.

*Affidavit of Lewis Hammond, Jr., in Opposition, Dated
September 12, 1973*

5. The original quotation which was mailed to the customer was drawn by the factory personnel of Baldwin-Lima-Hamilton and communicated to us through Ray Lynn.

6. Thereafter, the asphalt plant was delivered by Baldwin-Lima-Hamilton Corporation directly to the customer Lizza Industries, Inc. Immediately after delivery to the customer, we received complaints from the customer which were communicated to the factory. Many meetings were held between the customer, ourselves and factory representatives with respect to the defects complained of by the customer.

7. Whatever our relationship may be in the sale of machinery that we stock and inventory, the relationship between Baldwin-Lima-Hamilton Corporation and Hodge & Hammond for the purpose of the sale of asphalt plants was strictly one of manufacturer and salesman.

8. If there are defects in the machinery delivered to the customer, then those defects are solely the responsibility of Baldwin-Lima-Hamilton Corporation. Baldwin-Lima-Hamilton Corporation manufactured and assembled this equipment and delivered it directly to the customer. We had nothing to do with the preparation of the equipment before the customer received it.

9. From the many meetings which were held between the customer, Baldwin-Lima-Hamilton personnel and myself, I am convinced beyond doubt, that the equipment did not produce in accordance with the contract dictated by Baldwin-Lima-Hamilton. This equipment was to produce four hundred tons per hour and never did that.

10. No collection procedures were ever instituted by Baldwin-Lima-Hamilton in connection with this matter

*Affidavit of Lewis Hammond, Jr., in Opposition, Dated
September 12, 1973*

against us until Lizza Industries and Mid-Hampton Asphalt Corporation, the customers, commenced their New York State action. It is obviously an attempt to avoid the litigation of the defects in the machinery that caused the plaintiff to commence this action in the Federal Court after a State action had already been commenced involving the same issues.

11. I am informed that the plaintiff has now brought a motion to terminate this case without the defendant having an opportunity to present the evidence in support of the issues raised in the pleadings.

12. I respectfully request that this Court require this case to proceed to trial with all of the parties present so that all of the issues may be determined.

(Sworn to by Lewis Hammond, Jr., September 12, 1973.)

Statement Pursuant to Rule 9(g).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

There are no genuine issues to be tried as to the following facts:

1. Distributor's Agreement was made between plaintiff and defendant on March 15, 1969 and amended on August 1, 1970.

2. Defendant placed its order No. S5508, dated August 5, 1970 with plaintiff for a 10,000 pound asphalt plant.

3. Plaintiff on August 12, 1970 acknowledged defendant's said order.

4. Defendant accepted plaintiff's terms of sale in respect of defendant's order No. S5508 on September 10, 1970.

5. Defendant's purchase order for a 6,000 pound asphalt plant is its purchase order S5558, dated February 18, 1971.

6. Plaintiff accepted defendant's purchase order S5558 on February 19, 1971.

7. The sales price for the 10,000 pound machine is \$412,161.00. Defendant paid thereon the sum of \$337,289.55. The balance thereon is \$74,871.45.

8. The sales price for the 6,000 pound machine is \$218,429.30. No payment has been made thereon.

Dated, September 7, 1973

SEWARD & KISSEL

By **JAMES B. M. McNALLY**

Of Counsel

Attorney for Plaintiff

63 Wall Street

New York, New York 10005

248-2800

**Affidavit of James B. M. McNally, Dated September 17,
1973.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of New York, ss:

JAMES B. M. McNALLY being duly sworn deposes and says:

1. That he has read the affidavit of Leland Stuart Beck verified on the 12th day of September, 1973 and the affidavit of Louis Hammond, Jr. verified the same date.

2. There is no denial of the purchase and sale by this plaintiff to this defendant of the two plants involved in this litigation.

3. There is no denial of the Distributors Agreement made between this plaintiff and defendant on March 15, 1969 and amended on August 1, 1970 which is attached to the moving papers and marked Exhibit A.

4. There is no denial that the defendant placed its order with this plaintiff for a 10,000 asphalt plant.

5. There is no denial that defendant accepted plaintiff's terms of sale in respect of this particular order as evidenced by Exhibit C attached to our moving papers.

6. There is no denial of the fact that defendant's purchase order for the 6,000 pound asphalt was accepted by plaintiff, all of which is evidenced by Exhibit D attached to our moving papers.

7. There is no denial that the sales price of the 10,000 pound machine was \$412,161.00, that defendant paid thereon the sum of \$337,289.55 and that there is a balance due of \$74,871.45.

*Affidavit of James B. M. McNally, Dated September 17,
1973*

8. There is no denial that the sales price for the 6,000 pound machine was \$218,429.30 and that no payment has been made thereon.

9. Attention is called to the fact that this defendant has failed to include a separate, short and concise statement of the material facts as to which it is contended there exists a genuine issue to be tried. We have set forth in our statement pursuant to Rule 9(g) of the General Rules of this Court, a statement that there is no genuine issue to be tried as to the aforementioned facts. Under Rule 9(g) all material facts set forth in the statement served by plaintiff are deemed to be admitted since they are not controverted. Defendant asserts, without factual support that the defendant was a sales agent and did not buy the two asphalt plants. Agency is a question of law under the agreement between the parties. (Exhibit A) The status of the parties is spelled out clearly in the writings attached to our moving papers and defendant's purchase orders. They establish, as matter of law, that defendant was not plaintiff's agent in respect of the sale of the two machines here involved. Moreover, it is undisputed that defendant invoiced the machines to its customers at prices higher than those invoiced by plaintiff to this defendant. (See Exhibit E annexed to plaintiff's moving affidavit, sworn to September 7, 1973, and paragraph 13 of said affidavit.)

10. The issue is simple. It is our contention that we sold the defendant the two plants which have been in use for two years, and we have not been paid except as stated above. The fact that a third-party claims against the defendant for an alleged defect in the 10,000 pound asphalt plant is not relevant to the issues herein.

(Sworn to by James B. M. McNally, September 17, 1973.)

**Reply Affidavit of Leland Stuart Beck, Dated
September 19, 1973, in Opposition.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of Nassau, ss:

LELAND STUART BECK, being duly sworn deposes and says:

That he is associated with Paul V. Rudden, the attorney for the defendant and makes this affidavit in reply to the affidavit of James B. McNally dated September 17, 1973.

1. Mr. McNally's affidavit totally ignores the affidavits submitted in opposition to his motion by your deponent and by Lewis Hammond, Jr.

2. The defendant specifically and expressly denies that the relationship between the parties with respect to these sales was governed by the exhibit attached to the plaintiff's papers.

3. The defendant specifically claims that the sale of these plants was made to Lizza Industries, Inc. and Midhamp-ton Asphalt, Inc. by the plaintiff with the defendant acting solely as a commission sales agent.

4. The defendant specifically alleges and claims that the plants as delivered failed to comply with the terms and conditions of the purchase order.

WHEREFORE, it is respectfully requested that this motion be denied in all respects.

(Sworn to by Leland Stuart Beck, September 19, 1973.)

**Opinion of Judge Charles Metzner, Dated December 6,
1973, on Motion for Reargument.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

METZNER, D. J.:

Defendant moves for reargument. The motion is granted, and upon reargument, the original determination is adhered to.

Plaintiff's supplemental memorandum for the first time points out that Exhibit D attached to plaintiff's moving papers could not possibly have been the contract upon which the second cause of action was predicated. Defendant did not make this point either in its papers in opposition to the original motion, or in the oral argument on the motion, or in the memorandum in support of its motion for reargument.

Plaintiff has submitted an affidavit pointing out that an error was made in attaching the contract marked as Exhibit D in the moving papers. It offers in place thereof the contract which should have been submitted to the court originally as Exhibit D.

It is perfectly clear that defendant was not misled by the inadvertent submission of the wrong contract. In fact, the contract now submitted to the court as Exhibit D is referred to in defendant's counterclaim in the state court action. Furthermore, the 9(g) statement setting forth the sales price for the machine was not denied by the defendant. Plaintiff is granted permission to substitute the papers submitted as Exhibit D in its affidavit of December 4, 1973 in place of the original Exhibit D.

So ordered.

Dated: New York, N. Y.
December 6, 1973

CHARLES M. METZNER
U. S. D. J.

Notice of Motion for Reargument.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIRS:

Please Take Notice that upon the pleadings and proceedings heretofore had herein, the opinion of the Honorable Charles M. Metzner, District Judge dated November 12, 1973 and the memorandum attached hereto, the undersigned will move this Court, before the Honorable Charles M. Metzner, District Judge, at the Courthouse, Foley Square, New York City on the 28th day of November, 1973 at 9:30 A. M. or as soon thereafter as counsel may be heard for an order permitting reargument of the motions heretofore made by both plaintiffs and defendants, pursuant to Rule 9m of this Court and upon such reargument for a modification of the opinion denying the motion for summary judgment and relegating the parties to the State Court proceeding for the resolution of all of the issues raised therein; and for such other and further relief as may be just and proper in the circumstances.

Dated: Mineola, N. Y.

Nov. 20, 1973

Yours etc.,

/s/ LELAND S. BECK

PAUL V. RUDDEN, Esq.

By, Leland Stuart Beck, Esq.

Office & P. O. Address

288 Old Country Rd.

Mineola, N. Y. 11501

To:

Seward & Kissel

**Affidavit of James B. M. McNally, Dated December 4,
1973.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York,
County of New York, ss:

JAMES B. M. McNALLY, being duly sworn, deposes and says:

1. He is counsel to the firm of Seward & Kissel, attorneys for plaintiff in this action.

2. The moving papers included the purchase order of the defendant, which was annexed as Exhibit D. The defendant raised no issue with regard to the said purchase order until the submission of the supplemental memorandum in support of its motion for reargument, which was received in the mail on November 26, 1973. Deponent made out-of-state telephone inquiries relative to defendant's said purchase order. In addition, an examination was made of the pleadings received from the attorney for the defendant herein in the Nassau County action entitled *Lizza Industries, Inc. et ano. v. Hodge & Hammond, Inc. et ano.*

3. This affidavit is made to correct the inadvertent submission of Exhibit D, which deponent has ascertained had reference to a machine purchased and paid for by the defendant. Permission is now asked to substitute the annexed Exhibit D for that heretofore annexed to the moving papers. The purchase order which is now submitted is dated February 2, 1971 and bears order No. S5551. The said order was accepted by plaintiff on the date of February 3, 1971, and by defendant on the date of February 19, 1971. The defendant's purchase order No. S5551 is plaintiff's sales order No. 56476 of 1971 as appears from the head note of the acceptance dated February 3, 1971, attached to defendant's purchase order.

Affidavit of James B. M. McNally, Dated December 4, 1973

4. Defendant's purchase order No. S5551 is in the sum of \$296,408 as appears from page 5 of said order. The machine described in order No. S5551 is the same machine referred to and described in Paragraph 23 of the defendant's counterclaim against Lizza Industries, Inc. and Midhampton Asphalt Corp. in the Nassau County Supreme Court action, which is annexed to the moving papers herein as Exhibit E. The said Paragraph alleges as follows:


"Defendant Hodge & Hammond, Inc. repeats and realleges that on January 28, 1971 plaintiff Lizza Industries, Inc. entered into an agreement with Hodge & Hammond, Inc. . . . for a purchase of a BLH 6,000 pound Madsen asphalt plant at a purchase price of \$296,408. A copy of that agreement is annexed hereto and made a part hereof".

5. Said machine was invoiced by the plaintiff to the defendant at \$218,429.30, as appears on the 9th line of Exhibit F annexed to the moving papers herein. Exhibit F in the extreme left hand column bears No. 55470, which is the sales order number appearing on plaintiff's acceptance dated February 3, 1971 attached to defendant's purchase order. The difference between the amount of plaintiff's invoice and the invoice from the defendant to Lizza Industries represents the profit of the defendant on its sale to Lizza Industries. The Court will note that plaintiff's 9(g) statement specifically sets forth the sales price for the 6,000 pound machine to be \$218,429.30, which is not denied by the defendant.

WHEREFORE, deponent requests that Exhibit D hereto annexed be substituted in place of Exhibit D of the moving affidavit in support of plaintiff's motion for summary judgment.

(Sworn to by James B. M. McNally, December 4, 1973.)

**Exhibit D, Annexed to Foregoing Affidavit of James
B. M. McNally—Purchase Order.**

(See opposite page.) 

LIMA DIVISION
BALDWIN-LIMA-HAMILTON CORPORATION

LIMA, OHIO 45802

AREA CODE 419 224-0421

A SUBSIDIARY OF ARMOUR AND CO.

February 3, 1971

Hodge & HAMond, Inc.
720 Garrison Ave.
New York, New York 10474

Subject: 6000# Asphalt Plant
Your Purchase Order No. S-5551
S/N 622 - Sales Order 56476-71
For: Lizza Industries, Inc.

Gentlemen:

Your subject order has been accepted and entered as shown on the enclosed acknowledgement copy, describing and pricing the equipment to be furnished. Terms of payment, destination, shipping date and shipping instructions are also shown. We appreciate your order and are proceeding at once with its manufacture. In order to avoid any misunderstanding or confusion, however, we ask that you carefully read your acknowledgement as well as the following points of clarification and let us have your acceptance by signing and returning the duplicate copy of this letter immediately:

1. BLH is to furnish only those items and equipment specified on the enclosed acknowledgement.
2. If this is a different model plant from any that you, as a distributor, have installed, we would furnish a service engineer to supervise the complete erection with the following stipulations.

All foundations must be in.

All material furnished by BLH must be at the job site.

All material such as piping, wiring, pumps, tanks, electrical supply, fuel supply, etc. that is to be furnished by the customer must be readily available and a crew of approximately six men, plus an electrician and adequate equipment to complete installation. This will enable plant to be erected in a reasonable length of time barring weather conditions or other unforeseen problems which might arise.

If for any reason the man works a week or ten days and any material shortage, beyond the control of BLH, exists which hampers the erection, the service representative will instruct the distributor's personnel on further erection procedures and will leave the job site. He will then return at the time that the material difficulties are overcome.

The erection of an asphalt plant that has not had proper coordination of materials prior to the start of the erection can go into six or eight weeks time and this is something that we must discourage.

3. BLH assumes no responsibility for negotiations between you and the customer, or others, for work or materials pertaining to the erection, installation and acceptance of the plant and components.
4. BLH will furnish foundation and layout drawings (plan-view and elevation) of the plant. The design and installation of foundations to suit local topography and building codes is the responsibility of others. BLH assumes no responsibility for equipment furnished by others, not furnished by BLH, that may be shown on the layout drawings. Schematic wiring and piping drawings will be provided for equipment furnished by BLH. Plant elevation drawings show driveway clearance under the mixer, foundation height, length of tower legs and relation of plant and components to datum. Any change from the dimensions shown will be at an additional price.
5. Compliance with State, Local or Municipal Specifications, building codes, air pollution, noise or dust abatement codes is not guaranteed unless it is so indicated on the face of this order.
6. When a bonafide order has been placed for a BLH-Madsen Asphalt Plant and entered into our production schedule, should this order be cancelled there will be a cancellation charge made of 3% of the total list price.

Your prompt response, indicating your acceptance of the order as entered, along with the above points, will avoid delay in placing your order in our production schedule.

We also request that you forward your confirming purchase order indicating complete shipping instructions at your earliest convenience.

Very truly yours,

BALDWIN-LIMA-HAMILTON CORPORATION
LIMA DIVISION

Ray Hahn

Ray Hahn
Sales Order Department Supervisor

RH:ka

cc: Mr. A. D. Bellows
Service Department
MR. Ray Lynn

ACCEPTED:

Hodge & Hammond Inc.
DISTRIBUTOR

BY *Harold V. Hughes* ASST. S
NAME TITLE

DATE: *2-19-71*

764

HODGE & HAMMOND, INC.
CONSTRUCTION EQUIPMENT
 720 GARRISON AVENUE
 NEW YORK, N.Y. 10474
 PHONE KILPATRICK 2-2400

To: Levin - Linn - Hamilton Corp.

ORDER NO. S

Linn, Ohio

DATE 7/7/71

SHIP TO:

Hodge & Hammond Long Island City -
 e/s Linn Industries Inc.
Hicksville, L.I., N.Y.

VIA:

Rail - Collect

*For Harold
 7-7-71*

LINE NO.	QUANTITY	NAME AND DESCRIPTION	PRICE	RECEIVED DELIVERY DATE
	One(1)	<p><u>696-12 Basic Tower (Less Bin & Screen)</u> Fully enclosed hot stone elevator with 18"x3" Buckets on S-102 1/2 Steel chains and 20 H.P. Elec. Motor; Overflow and oversize chutes & Storage Bin. 75Cu. Ft. working capacity app. weight Box 4 pts. suspension with 10,000 lb. capacity springless dial scale patented asphalt pressure injection system asphalt line thermometer. 105 gal. capacity heated asphalt weigh bucket counterweighted lever system. 1000 lb. cap. sprg. less dial scale. 6,000# rated cap. twin shaft pug mill with Ni-Hard Mixer tips & Patented Externally removable segment liners. circulating hot oil jacket on mixer. jacketed spray bar and Plant Tower asphalt Piping. Air cylinder operation of mixer discharge gate four Bin gates, weigh box gate, asphalt injection valve & Asphalt bucket filler. Run-Around Mixer Paddle arrangement. fully enclosed mixer drive gear reduction unit. anti-friction bearings throughout. 125 H.P., 1200 RPM, Mixer Motor 9 Ft. Plant tower legs on 36" Piers Ft. of Hot Elevator on Datum. 12" Plant scavenger dust piping Necessary drives, plant framing, ladders walkways & Railings. <u>696-12-1E</u> 60"x16Ft. symons 3/4 deck vibrating screen with 20HP 1800 RPM tefc electric motor & 4 compartment. 50 ton cap. hot aggre. storage bin. <u>696-1202</u> Externally Heated asphalt bucket. <u>696-12-05</u> Combin. of 4 High & Low level bin Indicators.</p>		

S 555.1

PER *W. B. Kilgus*

696-12A Dryer 66' x 20' ft. Stationary Type

Perfo Lifters
Spiral Fed Flights
Rolled Steel Tires
Cradle Chain Drum Drive
Single Elonged Trunnions
Hot End Cowling
Extended Frame for Mounting of Burner
Seal Ring
Center Bottom Discharge Chute
Stack end cowling with floating counterweighted Dust
Seal Ring
Agg. Inlet Chute
75 HP, 1800 RPM Electric Motor
Anti-Friction Bearings
Cold end designed for In-Line Cold Elevator Feed
696-12A-02 High sweep discharge chute

C. 696-12B- Oil Burner Manual Type

Low Pressure air atomizing model #FP-103
60 H.P., 3600 RPM Electric Motor
Conical firebox with hammered in refractory in place
696-12B-01 Fuel oil pump mounted on Unit-Base driven by
2 H.P. Electric Motor

- D. 696-12B-03 Automatic Gencontrol FP-103 Oil Burner, Up-
right cab. incl. push button start, flame modulating
controls, indicator lights, temperature recorder con-
troller, auto-manual switch, weather-proof control
panels, hi-limit stack temperature control, flame
safe guards.
696-12B-06 Advance temperature detector
696-12B-07 For console cab., in lieu of upright cabinet

- E. Model 2120 Includes 2 10 ft. cone type cyclones with
#100 heavy duty exhaustor mounted on a transport type
frame; 48" dust piping from dryer to cyclone; dust
gathering screw and 10" dust transfer screw conveyor
for discharge to boot of hot stone elevator; 5 H.P.
1800 RPM transfer screw conveyor drive; 125 HP, 1800
RPM exhaustor drive motor; motor base and drives,
150 H.P., 1200 RPM exhaustor drive motor in lieu of 125 H.P.
1800 RPM Exhaustor drive motor. Additional for transfer
screw 5 HP

Model 38-9, SVGR-10T Multiclone complete with framing; transfer screw

- G. 696-120 Asphalt Circulating (1515) Pump 3" rotary type.

696-12E Air Compressor-22 C.F.M. Cap. 120 Gal. Air receiver, 110 P.S.I. & a 15 H.P., 1800 R.P.M. Elec. Motor

696-12J Wet Tube Washer

Model #9612 Includes two 96"x12' Tubes with and 74"x35' stack; cast iron spiral flights; water spray piping and nozzles includes largers 150 H.P. exhaustor motor & Controls

- K. 696-12J-01 Water Pump to be used with above washer One ELH-Madsen water pump recirculating type 2"x3"x8 1/2" with a 20 H.P., 3600 R.P.M. Direct coupled drive motor; all mounted on Unit Base; 250 GPM at 60 PSI

L. 696-12K Electrical Control Center

Electrical control center for 275/440 Volt Service Includes One (1) Weather-Proof cabinet mounted on Operators Platform with Main Breaker, and controls for motors on mixer, hot elevator, screen Dryer & exhaustor. Includes one 5KVA Transformer for 110 volt service tower motors (Mixer, Hot Elevator & Screen) are wired in complete rigid or flexible conduit. In-Coming Power wiring to control center not included. Cables or wiring between control center & Outlying motors not included. No Metering Section is furnished. Magnetic reduced voltage starters are Across-The-Line. Includes Starters & Breakers are required

Cold Elevator	15 thru 20 HP
Burner Blower	60 HP
Fuel Oil Pump	1 thru 5 HP
Asphalt Circulating Pump	10 HP
Air Compressor (Breaker Only)	25 HP
Hot Oil Heater (" ")	-----
Dust Elevator	5 HP
Water Pump	15 thru 25 HP
Dust Screw Conveyor	3 thru 7 1/2 H.P.

Cables with quick disconnects, plug and
lets for interconnection between control
and outlying electric motors for the follow-

Cables for exhaustor and dryer only

- " " Cold Elevator
- " " Burner Blower
- " " Fuel Oil Pump
- " " Asphalt Circulating Pump
- " " Air Compressor
- " " Hot Oil Heater
- " " Dust Screw Conveyor
- " " Water Pump

Length of cable based on control center on operators
platform.

8'x12' Portable, Including transport frame, bins,
24" Gathering conveyor and drive-less feeders
starter & Breaker installed in plant control center
quick disconnect type cables

4 F-380 Syntron feeders (w/Std. "C" Controller)-
Each Cap. 170 TPH

Individual and master control for four syntrons
Breaker and sequential contractor for syntrons
mounted in plant control center (1,2,3, or 4
syntrons) quick disconnect type cables for syntrons
24"x60" mast type incline conveyor

- O. House Trailer for BLH-Madsen Asphalt Plant 35'10"
with gas/oil furnace, complete washroom, air
conditioning, 10' Office Room Deck, 5' Control Room
Deck, Cabinet for ticket printer

- P. Installation of Automatic Batching System
Includes mounting remote dial heads & operators
console fabricated pedestals for asphalt & Aggre-
gate dial heads; installation of interconnecting
wiring between console scale heads & Quick Dis-
connect panel.

Installation of automatic burner Control

Includes mounting of console unit & Wiring to
quick disconnect panel.

Installation of Remote Pushbutton Station

Includes mounting of cabinet & Wiring to quick
disconnect panel

Remote Application for BLH-Madsen Plant

For remote application of the wiscel unit within
50' of the

Continued

the tower, includes Junction Box
 special cable with quick disconnects.
 two remote dial heads, for remote in-
 of the system feeder control cabinet with-
 centerline of tower includes portable power cab-
 quick disconnects from the electrical control
 to the remote location. For remote installation
 inner control unit within 50' of centerline of tower
 uses cables to burner and control center with quick
 connects.

additional cable per foot
 a pushbutton station located within 50' of the
 centerline of the tower includes pushbutton for all
 towers with plant cable to electric control center
 of tower and quick disconnects.

For Four Hot Bins Only

Miscel fully automatic preset type asphalt batching
 unit; controls the weight of 4 aggre. One dust & One
 asphalt; empties the aggregate weigh box, controls
 a specified dry mix cycle; empties the asphalt weigh
 bucket; controls a specified wet mix cycle, opens
 the mixer gate; dumps the complete load and closes the
 mixer gate. Includes One set of six presets under Lock-
 able glass door and material suspension compensators
 for 6 material 4 aggregates, and 0 dust and 1 asphalt
 Includes truck size batch selector counter; selector
 switch for 1 of 2 asphalts; total batch counter. also
 included are provisions for future additional ticket
 printer or strip chart re-corder at which time scale heads
 must be returned for alterations. Load Counter.
 Card reader kit, Ticket Printer TCR Type, Over and Under
 check, High and Low Bin Level Light

R. Hot Elevator #4,000, 5,000, 6,000, 8000, & 10,000 Plants
 Screen Bin Unit 4,000, 5,000, 6,000, & 10,000
 Mixer weight box Unit 4,000 Lb., 5000 Lb, & 6,000 Lb.
 Dryer 96"x30' & 36', & 24"x36'-104"x30"x36'
 Dust Collector #2120
 Cold aggregate feeders-8'x10' & 8'x12' In-Line
 Wet Tube Washer #9612

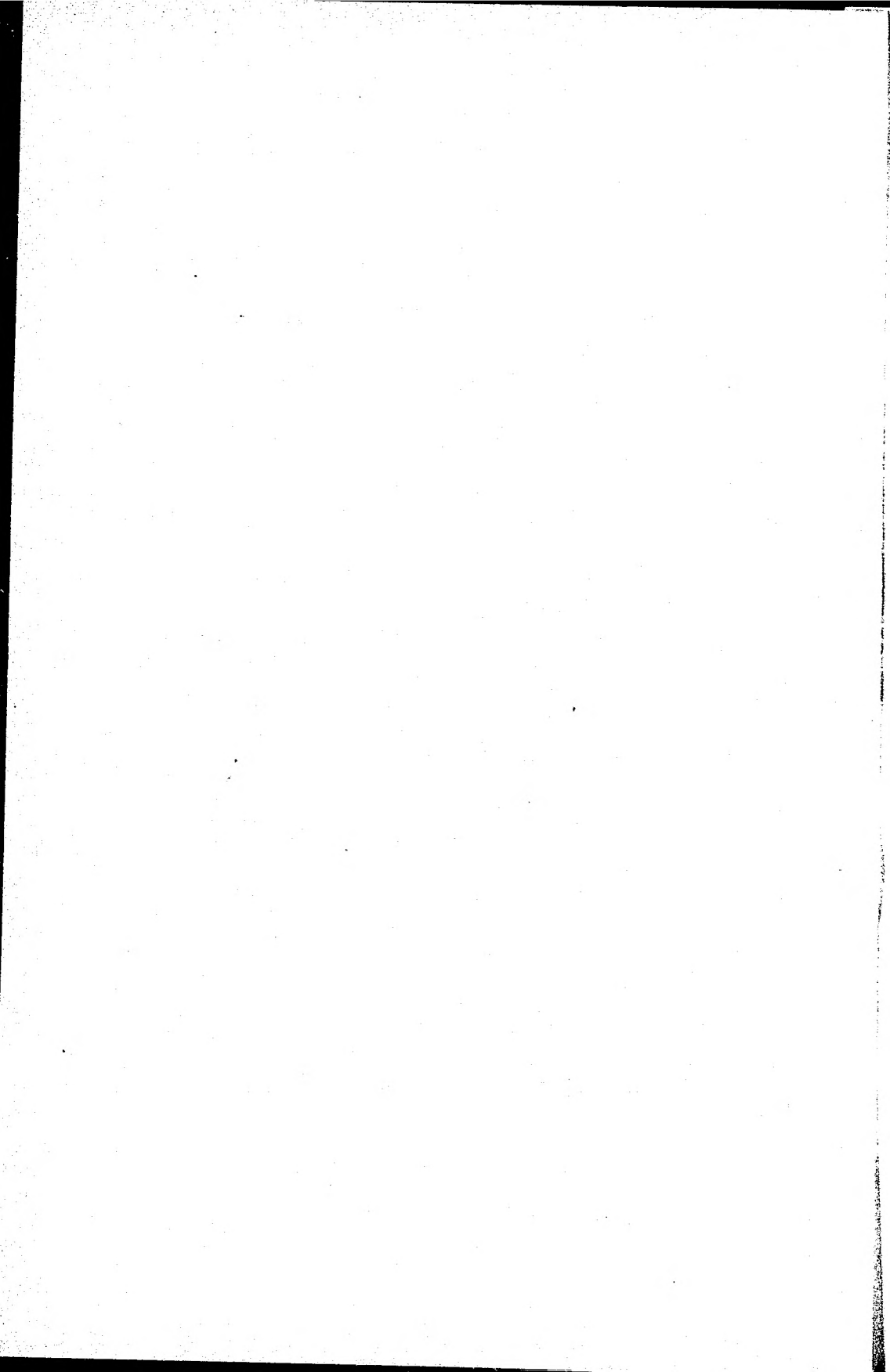
TOTAL PRICE F.O.B. HICKSVILLE, L.I., N.Y.....\$296,408.00

CONFIRMATION OF RAY LYNN CONVERSATION TO
 ED PARKHILL

Exhibit

Exhibit F

CURRENT		PAST DUE			
		1-30 DAYS		31-60 DAYS	
					OVER 60 DAYS
					7118
					4335
					47401
					1110
					45101
					1226
					41348000
					87125
					21842950
					1091CR
					38579CR
					1252CR
					4771CR
					5780CR
					5678CR
					1486CR
					800000CR
					29102100CR
					4046470CR
					29377025



77a

Judgment Appealed From.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Plaintiff having moved for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment to the plaintiff for the relief demanded in the complaint, or partial judgment in favor of plaintiff against defendant, or a preference for the trial of this case; and the Court having heard the argument of counsel, it is

ORDERED, that the plaintiff's motion for summary judgment as to the first cause of action is hereby denied, and the action is stayed pending the disposition of the action pending in the Supreme Court, Nassau County

ORDERED, that the plaintiff's motion for summary judgment as to the second cause of action is hereby granted, and the undersigned expressly determines there is no just reason for delay in the entry of final judgment on said cause of action, and it is further

ORDERED, adjudged and decreed, that plaintiff recover of the defendant, Hodge & Hammond, Inc. the sum of \$218,429.30, with interest from June 1, 1971 to the date hereof, in the sum of \$34,994.04, a total of \$253,423.34.

Dated: New York, N. Y.
December 6, 1973

CHARLES M. METZNER
U. S. D. J.

Judgment Entered
Dec 7 1973
RAYMOND F. BURGHARDT
Clerk.

Notice of Appeal.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

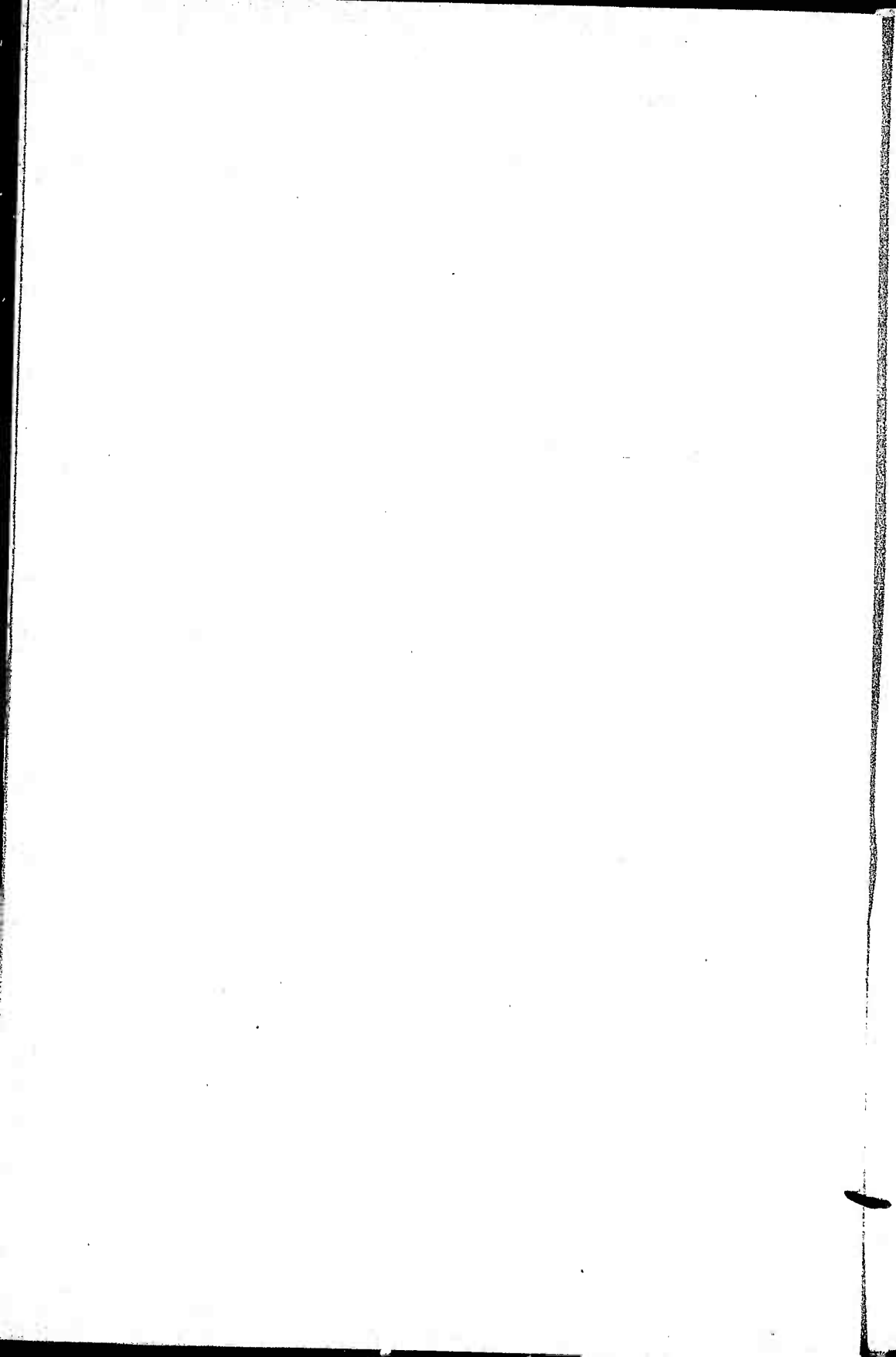
SIR:

Please Take Notice that the defendant Hodge & Hammond, Inc. hereby appeals to the United States Court of Appeals for the 2nd Circuit from that portion of the judgment of this Court dated December 6, 1973 which granted summary judgment in favor of the plaintiff BLH, Incorporated against the defendant Hodge & Hammond, Inc. in the sum of \$253,423.34, which judgment was entered in this Court on December 7, 1973 and from each and every intermediate order leading to the rendering of that judgment.

Dated: Mineola, N. Y.
December 10, 1973

Yours, etc.,

LELAND STUART BECK
Attorney for Defendant
288 Old Country Rd.
Mineola, N. Y. 11501



Shelves of three (3) copies of
the Appendix is
made, on the 5th day
of February, 1914
Lewand & Kissel
Appellee